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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 308

MODERN WOODMEN OF AMERICA, PETITIONER,

vs.

JENNIE VIDA MIXER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF NEBRASKA

PETITION FOR CERTIORARI FILED MARCH 3, 1925

ORDER GRANTING PETITION FILED APRIL 22, 1925

(30,171)

Bylaw 66 is in substance
& effect rather more than
a mere evidence

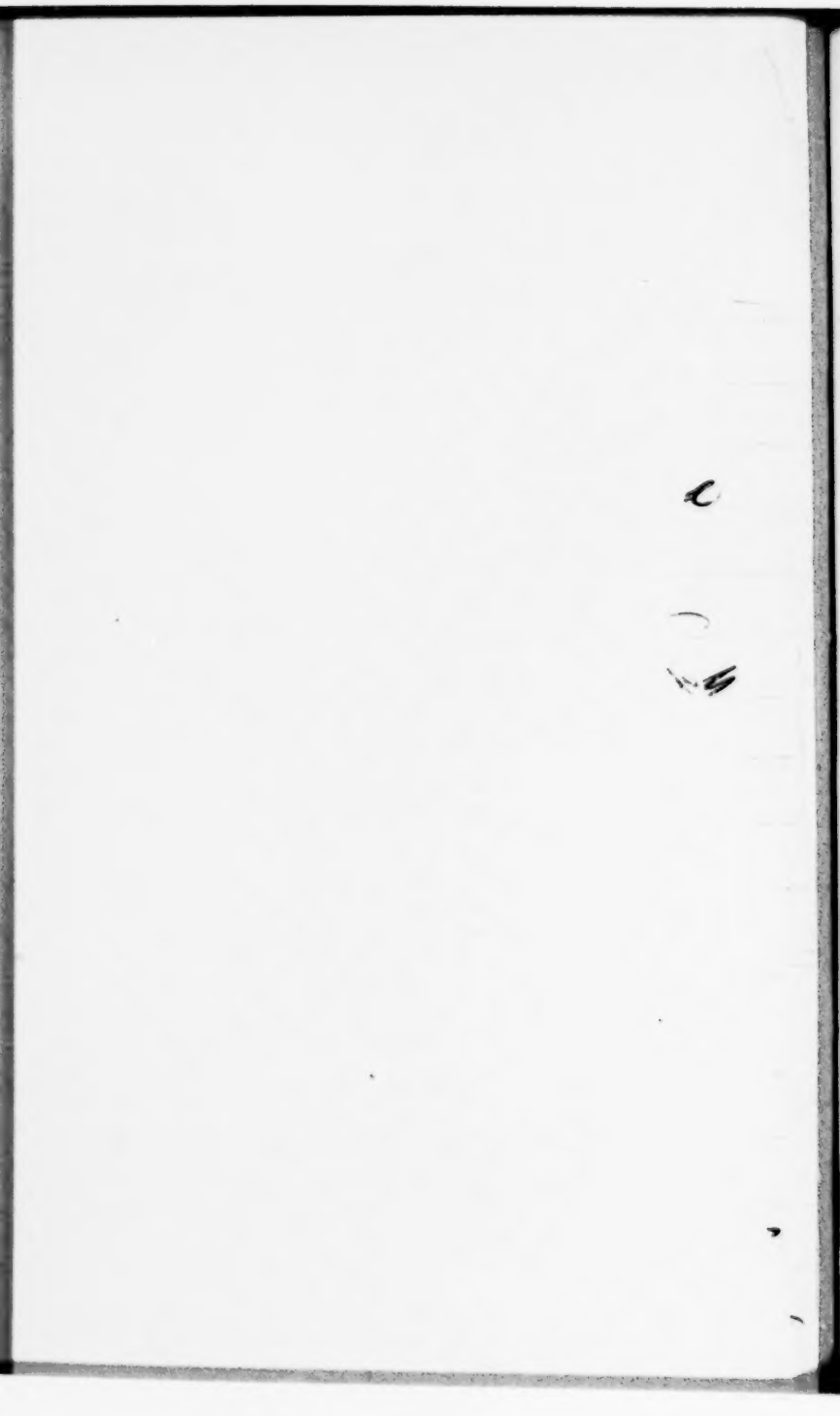
The liability of company
was made to depend
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Corp. Cant. Migsab. It
shows it goes with it.
109/ per N. M. H.

V.

Does plea fall credit
make any difference
That is, no fed. qn'
Unless faith & credit
be added

Good in all. Not lower any other credit



(80,171)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 861

MODERN WOODMEN OF AMERICA, PETITIONER,

vs.

JENNIE VIDA MIXER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF NEBRASKA

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[fol. 1] Caption in Supreme Court of Nebraska omitted

[fols. 2 & 3] [Caption omitted]

[fol. 4] [File endorsement omitted]

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

JENNIE VIDA MIXER, Plaintiff,

VS.

MODERN WOODMEN OF AMERICA, Corporation, Defendant.

PETITION—Filed October 7, 1921

Comes now the plaintiff and for cause of action alleges and states;

1. That the defendant, The Modern Woodmen of America, a fraternal beneficiary society, is incorporated, organized and doing business under the laws of the State of Illinois and is also doing a life insurance business under and by virtue of the laws of The State of Nebraska.

2. That on or about the 18th day of November, 1901 the defendant by its policy of insurance No. 842,861 and a consideration on payment of certain premiums, at certain times, did insure the life of Walter Crocker Mixer in the sum of \$2,000.00, to be paid in case of his death to the plaintiff, his wife, Jennie Vida Mixer. A copy of said policy is hereto attached and marked, "Exhibit A" and made a part of this petition.

3. Plaintiff further states, that the said Walter Crocker Mixer, while living at Sioux City, Iowa, with his wife and family disappeared in the month of September, 1910 and that the plaintiff nor any of her family ever heard of the whereabouts of the said Walter Crocker Mixer, since said time, except in February, 1911, the plaintiff received a letter from the said Walter Crocker Mixer, stating that he was in a hospital at Midland, South Dakota: that the said plaintiff has made inquiry and investigation and finds that there was [fol. 5] not any hospital at Midland, South Dakota at that time. That the said plaintiff and the members of her family have never heard from the said Walter Crocker Mixer, since February, 1911. Plaintiff further states that she has written and inquired of all the brothers and sisters of Walter Crocker Mixer and any of the relatives that she knew and also has inquired at different places where she thought the said Walter Crocker Mixer might be and the said investigation and inquiry has not disclosed the whereabouts of the said Walter Crocker Mixer. That the said Walter Crocker Mixer has been absent from his home and place of residence for over seven (7) years, last past, and said absence has been continued and unexplained and that by reason of said facts said Walter Crocker Mixer is presumed to be dead.

4. Plaintiff further states that she has paid all of the assessments levied against said insurance policy and that all assessments are now paid, in full. Plaintiff further states that in 1912, soon after the disappearance of said Walter Crocker Mixer, she informed the said defendant of the fact and she had considerable correspondence with the said defendant and the defendant with her, concerning the disappearance of the said Walter Crocker Mixer. That on the 9 day of September 1921 she sent to the defendant an affidavit respectfully asking for the \$2,000.00 due under said life insurance policy. A copy of said affidavit is hereto attached, marked, "Exhibit B," and made a part of this petition. That said affidavit was duly received by the said defendant and they have refused to pay the plaintiff the amount due under said life insurance policy, which is marked, "Exhibit A," and made a part of this petition. Plaintiff further states that the defendant refused to pay her the sum of \$2,000.00 due under said life insurance policy.

Wherefore plaintiff prays judgment against said defendant for the sum of \$2,000.00 and interest from 9 day of September, 1921 at 7 per cent and costs of suit.

Geo. W. Leamer, Attorney for Plaintiff.

[fol. 6] Jurat showing the foregoing was duly sworn to by Jennie Vida Mixer omitted in printing.

EXHIBIT A TO PETITION

Form 135

Notice

A social Neighbor transferring to Beneficiary membership, under the provisions of Section 72 of the 1901 By-Laws, is liable for the assessment current on date borne by the Benefit Certificate, therefore the first liability under this certificate is for assessment No. 11.

C. W. Hawes, Head Clerk M. W. of A.

842,861. Age, 42. Rate, \$1.05. Amount, \$2,000.00

Benefit Certificate, Modern Woodmen of America

The Modern Woodmen of America, a Fraternal Beneficiary Society, incorporated, organized, and doing business under the laws of the State of Illinois, hereby certifies: That neighbor Walter Crocker Mixer, a member of Forest Camp No. 1957 of the Modern Woodmen of America, located at Elk Point, County of Union and State of South Dakota is, while in good standing, entitled to the [fol. 7] privileges of this society, and his beneficiary or beneficiaries hereinafter named shall, in case of his death, while a beneficial

member of this society, in good standing, be entitled to participate in the Benefit Fund of this society to the amount of two thousand dollars, to be paid to the said beneficiary or beneficiaries, to-wit: Jennie Vida Mixer related to said member in the relationship of wife. Provided, however, that all the conditions contained in this Certificate, and the By-Laws of this society, as the same now exist, or may be hereafter modified, amended, or enacted, shall be fully complied with; and provided, further, that in the event of the death of any beneficiary prior to the death of said Neighbor, and upon his failure to designate another beneficiary, then the amount to be paid under this certificate shall be due and payable to the other surviving beneficiaries, if any there be; or, if none survive him, then to the wife of such member, if she survive him; or, in case he has no surviving wife, to his legal heirs. Said fund, out of which any liability hereon, as well as all other mortuary liability, shall be paid, shall be created by levying upon all members of this society sufficient assessments, from time to time, to pay all such liability in full.

This Benefit Certificate is issued and accepted only upon the following expressed warranties, conditions, and agreements:

1. That the Modern Woodmen of America is a Fraternal Beneficiary Society, incorporated, organized and doing business under the laws of the State of Illinois, and legally transacting such business in the state where said member resides; that the application for membership in this society made by the said member, a copy of which is hereto attached and made part hereof, together with the report of the Medical Examiner which is on file in the office of the Head Clerk, and is hereby referred to and made part of this contract, is true in all respects, and that the literal truth of such application, and each and every part thereof, shall be held to be a strict warranty and to form the only basis of the liability of this society to such member, and to his beneficiary or beneficiaries, the same as if fully set forth in this benefit certificate.

2. That if said application shall not be literally true in each and every part thereof, then this benefit certificate shall, as to the said member, his beneficiary or beneficiaries, be absolutely null and void.

3. This certificate is issued in consideration of the warranties and agreements made by the person named in this certificate in his application to become a member of this society, and also in consideration of the payment made when adopted as a Neighbor in prescribed form, and his agreement to pay all assessments and dues that may be levied during the time he shall remain a member of this society.

4. If payments assessed against the said member are not paid to the Clerk of the Camp of which he is or hereafter may be a member, on or before the first day of the month following the date of the notice of levy of the same, then this certificate shall be null and void, and shall so continue of no effect until payment is made in

pursuance of the requirements of the By-Laws of this society as the same *now* exist; subject, however, to change from time to time, as the same may be affected by the enactment of new By-Laws or the modification or amendment of any now in force.

5. If the member holding this certificate shall be expelled from this society, or become intemperate in the use of alcoholic drinks, or in the use of drugs or narcotics, or if he shall be or become engaged in the manufacture or sale of malt, spirituous or vinous liquors to be used as a beverage, in the capacity of proprietor, stockholder, agent or servant, or if he shall be convicted of a crime or felony, the punishment for which may be imprisonment in the penitentiary, after being adopted into this society, or if he shall, [fol. 9] within three years after becoming a beneficial member of this society, die by his own hand, whether sane or insane, or if his death shall occur in consequence of a duel, or of any violation or attempted violation of the laws of any state or territory or of the United States, or by the hands of his beneficiary of beneficiaries (except by accident), or if his said application for membership or any part of it shall be found in any respect untrue, then this certificate shall be null and void and of no effect, and all moneys which have been paid and all rights and benefits which may have accrued on account of this certificate, shall be absolutely forfeited and this certificate become null and void.

6. No action can or shall be maintained on this certificate until after the proofs of death and claimant's rights to benefits as provided for in the By-Laws of this society have been filed with the Head Clerk, and passed upon by the Board of Directors, nor unless brought within eighteen months from the date of the death of the member.

7. If said member shall enter upon or follow any of the employments or occupations mentioned in Section 14 of the By-Laws of this society, now in force or as hereafter amended, this certificate shall, so far as the same is intended to provide for the payment of benefits, become, ipso facto, null and void as to any claim growing out of or made on account of the death of said member by accident directly traceable to employment in such hazardous occupation, or from any disease directly traceable thereto; Provided, that if the occupation engaged in was not prohibited by the laws of this society at the date of the issuance of said member's certificate, nor at the time he engaged therein, the provisions of this clause shall not apply.

8. This certificate and contract is and shall be subject to forfeiture for any of the causes of forfeiture which are now prescribed in the By-Laws of this society, or for any other cause or [fol. 10] causes of forfeiture which may hereafter be prescribed by this society by amendment of said By-Laws.

In witness whereof, the said Modern Woodmen of America, has, by its Head Counsel and Head Clerk, signed, and caused the cor-

porate seal of said corporation to be affixed to this certificate at the City of Rock Island, in the State of Illinois, this Eighteenth day of November, 1901.

C. W. Hawes, Head Clerk. W. A. Northcott, Head Counsel.
(Seal.)

Member adopted and certificate delivered this 20th day of November, 1901.

F. D. Smythe, Clerk, C. G. Vollmer, Counsel, Forest Camp
No. 1957, M. W. of A.

I hereby accept the above Benefit Certificate and agree to all the conditions therein contained.

W. C. Mixer.

A copy of your application for membership is attached to this certificate. Read it. If any answer of statement therein is not correct notify the head clerk at once.

Attached to benefit certificate, is the following:

Form No. 106 $\frac{1}{2}$, Edition 8, Aug. 1, 1899

This page must be filled out by applicant before medical examination. The Clerk of Camp will next (read this note) certify to applicant's election to membership. Applicant must then complete this application in the presence of and with the aid of the Camp Physician.

Application for Membership and Benefit in Modern Woodmen of America, a Praternal Beneficiary Society, Incorporated, Organized, and Doing Subiness under the Laws of Illinois.

Elk Point, State of So. Dak., Nov. 4, 1901.

[fol. 11] To the Head Camp Modern Woodmen of America and to the Members of Forest Camp, No. 1957, located at Elk Point, County of Union, State of So. Dak.:

I hereby make application for membership in your Camp and the Society of Modern Woodmen of America, and for indemnity in case of my death while a member in good standing of said Society in the sum of \$2,000.00.

For such purpose I hereby tender to said Society the following true and complete answers and statements:

1. I reside at Elk Point State of So. Dak., at No. — Street, and within the jurisdiction of the Camp above named, as defined in Sec. 231 of the By-Laws of said Society.

2. I was born in the State of Wis. on the 18 day of May, 1859, and therefore am now between 42 and 43 years of age. Are you Married? Yes.

3. What is your occupation? Retail treeman. Place of business? Elk Point. Do you work for wages or salary? Wages. Give name of your employer. C. I. Rofter. What is your employer's business? Nursery Mah.

4. I am engaged in an honorable and lawful business or vocation, and I am not now directly or indirectly engaged in any of the following occupations prohibited by the By-Laws of said Society, viz; Manufacture or sale of spirituous, malt or vinous liquors as a beverage, in the capacity of proprietor, stockholder, agent or servant; railroad freight brakeman, railroad freight conductor, railroad locomotive engineer, railroad fireman, railroad switchman, railroad switch tender, railroad yardmaster, railroad yard foreman, miner employed underground mine inspector, mine track layer, pit boss, professional rider or driver in races, employee in any factory where gun-powder, nitroglycerine, dynamite, or other dangerous explosive is manufactured, glass blower, oil well "shooter," aeronaut, sailor on the great lakes or seas, brass finisher, plow polisher or plow grainder in plow factories, professional baseball player, professional fireman [fol. 12] (Menaing thereby a member of a paid city fire department, depending upon such employment as a principal means of support), submarine operator, actual military or naval service in time of war, employee in slag furnace in lead works, color and white lead factory employee, or steel blaster; none of the duties incident to any of the foregoing prohibited occupations are among the duties of my present employment, or of my usual vocation, and I agree that I will not hereafter, while a member of this society, engage in any of these occupations, except at the same time recognizing the full force of the Society's law limiting or extinguishing its liability upon the certificate of any member engaging in such occupations.

5. I agree to make payment of all dues and assessments legally levied, within the limit of time provided by the Society's Law, and to conform in all respects to the laws, rules, and usages of the Society now in force, or which may hereafter be enacted and adopted by same; and that this application and the laws of this Society shall form the sole basis of my admission to and membership therein, and of the Benefit Certificate to be issued me by said Modern Woodmen of America; that any untrue statement or answer, or any concealment of facts, intentional or otherwise, in this application (including therein next succeeding page), or my being suspended or expelled from or voluntarily severing my connection with the Society, shall forfeit the rights of myself and that of my beneficiaries to any and all benefits and privileges growing out of my membership in said Society.

6. I am a believer in a Supreme Being. I fully understand the objects, organization, mode of government, and the laws of this Society, and particularly that part of the Laws defining the qualifications for and the restrictions upon its membership, and that providing for the forfeiture of indemnity for untrue statements or answers in an application for membership. I further understand and agree that the laws of this Society now in force, or hereafter

enacted, enter into and become a part of every contract of indemnity [fol. 13] by and between the members and the Society, and govern all rights thereunder; and I further understand and agree that this Society does not indemnify against death from suicide, sane or insane, if occurring within three years from date of certificate, or from death resulting from occupations prohibited by its laws.

7. I direct that the Benefit Certificate which may be issued to me in pursuance of this application recite as beneficiaries the following named, and to each the amount designated, whose relationship to me I certify to by as stated, viz: \$2,000.00 to (Name:) Jennie Vida Mixer, (Residence:) Elk Point, State of So. Dak., (Relations:) wife.

8. Is this application for original membership? No. Or for restoration of membership, having been in suspension more than six months? Yes. Or for increase in certificate or for transfer from social to beneficiary?

9. Have you ever been a member of this Society? Yes. If so, give location of your Camp. State of Iowa, Maynard. Camp No. Don't know. Give date of adoption. Don't know.

10. Have you heretofore made application for membership in this Society and failed to complete the same? No. Give location and number of the Camp. ——. If so, state why you failed to become a member. —.

11. Have you at the present any life insurance? No. If so, name companies or societies and amounts carried by you in each. —.

12. Have you ever been rejected by any life insurance company or companies, mutual benefit association or associations, or fraternal beneficiary society or societies? No. If so, give name of same and the year you were rejected. —.

13. Has any examining physician for life insurance company, association, or society ever declined to recommend your application? No. If so, give such physician's name and address. —. Have you ever made application for life insurance or beneficiary indemnity, and withdrawn such application before final action? No. If so, give name of company or companies, association or associations, society or societies, and years.

14. Have you within the last seven years been treated by or consulted any physician, in regard to personal ailment? No. If so, give *give* dates, ailment, and physician's or physicians' name and address. —.

15. Are you now of sound body, mind and health, and free from disease or injury; of good moral character and exemplary habits? Yes.

16. Has your weight recently increased? No. Or diminished? No. How much? —. When? —. Have you ever had any

local disease, personal injury or serious illness? No. If so, explain fully, giving dates. —.

17. Do you abstain entirely from the use of intoxicating liquors? No. State when last intoricated? Never. State kind and quantity of liquor consumed daily? One glass of beer per week. Have you ever taken any treatment for the cure of the liquor habit? No. Date, —.

18. Do you abstain entirely from the use of tobacco? No. If not, what quantity do you consume per week? Smoke 2 cigars daily.

19. Do you now use or have you ever used any form of opium, morphine, cocaine, or other narcotics? No. If so, state the kind and quantity. —.

20. Have you ever taken any treatment for tobacco, morphine, cocaine, or opium habit? Date, —.

21. Have you been an inmate of any infirmary, sanitarium, retreat, asylum, or hospital? No. If so, where? —. When? —. Duration? —. For what cause? —.

22. Have you ever applied for or received a pension? No.

I direct that the official paper be mailed to me at address given below until I shall notify the Head Clerk to change same.

Walter Crocker Mixer, Applicant. J. E. R., Witness to Signature.

[fol. 15] Recommended by — —. P. O. Address: No. — Street, Elk Point, State of So. Dak. Date: Nov. 21th, 1901.

Read This

The answers to the following questions must be made by the applicant and written under his direction by the local Camp Physician, who, upon completion of the same, and after applicant has attached his signature, shall return it to the Clerk or Deputy Head Consul, who will mail it to the Head Physician of the Medical District in which the Camp is located, with his fee of 25 cents enclosed.

23. Have you ever had inflamed or swollen joints from rheumatism? No. If so, give number, dates, and duration of attacks. —.

24. Are you ruptured? No. If so, what kind? Has it been strangulated? —. Do you now and will you continually wear a truss? —. Is rupture perfectly retained? —.

25. Have you had small-pox? No. Varioloid? No. Have you been successfully vaccinated? Yes. If not, do you agree that any certificate issued to you by this Society shall be void if you die of either small-pox or varioloid? —.

26. Have you ever lived in the family with, or nursed any person who was afflicted with or died from consumption? No. If so, when? —.

27. Have you ever had any disease of the following named organs or any of the following named diseases or symptoms? Answer yes or no to each: Abscess? No. Discharge from ear? No. Gravel? No. Paralysis? No. Agge? No. Disease of bladder? No. Habitual headache? No. Dizziness or vertige? No. Habitual coughing? No. Pneumonia? No. Piles? No. Appoplexy? No. Asthma? No. Dropsy? No. Heart? No. Inflammatory rheumatism No. Brain? No. Dyspepsia? No. Indications of insanity? No. Scrofula? No. Bronchitis? No. Enlarged veins? No. Ja-ndice? No. Spinal disease? No. Cancer? No. Epilepsy? No. Kidney disease? No. Spitting blood or other hemorrhages? No. Catarrh? [fol. 16] No. Fistula? No. Liver No. Stricture? No. Chronic diarrhca? No. Fits? No. Lungs? No. Sunstroke? No. Consumption? No. Gall stone? No. Neuralgia? No. Syphillis? No. Diphtheria? No. Giotre? No. Open sores? No. Tumors? No. Remarks: —.

28. State your family history in answer to the following particulars:

In giving "Cause of Death," avoid all indefinite terms such — "Fever," "General Debility," "Exposure," etc. If the word "Child-birth" be used, specify how long after delivery the death occurred, and whether it was accompanied by any disease of the Chest.

Family Record

	Present age	Present condition of health
Is your father living?.....	84	Good.
Is your Mother living?.....	78	Good.
How many brothers living?.....	45	Good.
1. (If none, so state.)		
How many Sisters living?.....	53	Good.
(If none, so state).....	38	Good.
Is Father's Father living?.....	..	.....
Is Father's Mother living?.....	..	.....
Is Mother's Father living?.....	..	.....
Is Mother's Mother living?.....	..	.....

[fol. 17]

Family Record

	Was tuberculosis a factor?	Age of	Cause of death	Duration of last illness	Previous health
Is your father dead?.....	...	..	.....	.....	.....
Is your mother dead?.....	...	..	.....	.....	.....
How many Brothers dead? (If none, so state.)					
How many Sisters dead? (If none so state).....	No.	35	Sunstroke.	2 wks.	Good.
Is Father's Father dead?.....	...	80	Old Age.	Don't know.	Good.
Is Father's Mother Dead?....	...	83	" "	" "	"
Is Mother's Father dead?....	...	75	" "	" "	"
Is Mother's Mother dead?....	...	91	" "	" "	"

If other than first-class, give particulars, and state whether tuberculosis is or was a factor.

Have any of your near relatives committed suicide? No. Or been afflicted with consumption? No. Insanity? No. Cancer? No. Or other constitutional or hereditary disease? No. If so, explain fully. —.

Applicant Will Please Note this Clause

I have verified each of the foregoing answers and statements from 1 to 28 both inclusive, adopt them as my own, whether written by me or not, and declare and warrant that they are full, complete, and literally true, and I agree that the exact literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and Modern Woodmen of America, and are offered by me as a consideration for the contract applied for, and are hereby made a part of any Benefit Certificate that may be issued on this application, and shall be deemed and taken as a part of such Certificate; that this application may be referred to in said Benefit Certificate as the Basis thereof, and that they shall be construed together as one entire contract; and I further agree that if any answer or statement in this application is not literally true, or if I shall fail to comply with *any* conform to any and all of the laws of said Modern Woodmen of America, whether now [fol. 18] in force or hereafter adopted, that my Benefit Certificate shall be void. And I waive for myself and beneficiaries all claim of benefit under this application until it shall be approved by the Head Physician and I shall be regularly adopted in accordance with the ritual of this Society, and shall make the payments as required by its laws at adoption; and any certificate which shall be issued to me in pursuance of this application shall be delivered to me after adoption and while in sound health, and in pursuance of the By-Laws of the Society. And I hereby expressly waive for myself and beneficiaries the privilege or benefits of any and all laws which are now or may be hereafter in force making incompetent the testimony of or disqualifying any physician from testifying concerning any information obtained by him in professional capacity. And I further expressly waive for myself and my beneficiary or beneficiaries the provisions of any law, and the statutes of any state, now in force or that hereafter may be enacted, that would, in the absence of this agreement, modify or conflict with my contract with this Society, or cause it to be construed in any way contrary to its express language.

Date Nov. 4, 1901.

Walter Crocker Mixer, Applicant.

Answers written by J. C. Rhoden, M. D.

EXHIBIT B TO PETITION

STATE OF NEBRASKA,
County of Dakota, ss:

I, Jennie Vida Mixer of lawful age, being first duly sworn deposes and says that she was the wife of Walter Crocker Mixer, and the beneficiary under benefit certificate number 842,261 of the Modern Woodmen of America, a Fraternal Beneficiary Society; that the said Walter Crocker Mixer, was a member of the Forrest Camp, number 1957 of the Modern Woodmen of America at Elk Point, Union County, South Dakota, and said benefit certificate was dated November 18, 1901, and was for the amount of \$2,000.00.

[fol. 19] Affiant further states that the said Walter Crocker Mixer disappeared in the month of December, 1910, and last heard from by his wife or any person was in the month of February, 1911, when he wrote that he was in a hospital at Midland, South Dakota; that said affiant and her family have made inquiries and have never heard where the said Walter Crocker Mixer is or where he went to from there since February, 1911.

Affiant further states that she has paid all assessments and dues under and by virtue of such benefit certificate, and that the said Walter Crocker Mixer has been absent from his home continuously, and his whereabouts have not been known since the month of February, 1911. Affiant, Jennie Vida Mixer, who is the beneficiary under said benefit certificate respectfully claims the \$2,000.00 due under said certificate and asks that the same be paid to her; that she has said benefit certificate in her possession and is ready to surrender the same upon said payment.

Jennie Vida Mixer.

Subscribed in my presence and sworn to before me this 9 day of September, 1921. Geo. W. Leamer, Notary Public.
My commission expires June 12, 1922. (Seal.)

[File endorsement omitted.]

DISTRICT COURT OF DAKOTA COUNTY, STATE OF NEBRASKA

[Title omitted]

ANSWER—Filed November 8, 1921

[fol. 20] Comes now the defendant, Modern Woodmen of America, and for answer to plaintiff's petition alleges and shows to the Court:

(1) Defendant admits that it is a corporation organized under the laws of the State of Illinois, but denies that it is doing a life

insurance business under and by virtue of the laws of the State of Nebraska.

Admits that on or about the 18th day of November, 1901, the defendant issued its Benefit Certificate No. 842,861 for the sum of Two Thousand Dollars (\$2,000) to be paid in the event of the death of Walter Crocker Mixer to his wife, Jennie Vida Mixer. The defendant admits a copy of said certificate is attached to plaintiff's petition and made a part of said petition.

Defendant denies that the said Walter Crocker Mixer, while living at Sioux City, Iowa, with his wife and family, disappeared in the month of September, 1910, and denies that the plaintiff, or any of her family have never heard of the whereabouts of the said Walter Crocker Mixer since that time.

Defendant denies that the plaintiff received a letter from the said Walter Crocker Mixer stating he was in the hospital at Midland, South Dakota; and denies that the plaintiff and the members of her family have never heard from the said Walter Crocker Mixer since February, 1911; denies that the plaintiff has made inquiry at different places where she thought the said Walter Crocker Mixer might be, and denies that the said defendant has not knowledge of the whereabouts of the said Walter Crocker Mixer; denies that the said Walter Crocker Mixer has been absent from his home and place of residence for seven years last past and said absence has been continuous and unexplained, and denies that the said Walter Crocker Mixer is dead.

Defendant admits that the plaintiff has paid all assessments up to the commencement of this action.

Defendant denies each and every allegation and averment, and each and every part thereof, contained in plaintiff's petition except [fol. 21] cept as herein expressly admitted to be true.

Division I

Defendant further answering, and for its first affirmative ground of defense to plaintiff's alleged cause of action, says that it is, and during all of the times in plaintiff's petition mentioned, has been a fraternal beneficiary society organized, incorporated and existing under and by virtue of the laws of the State of Illinois, and operating under a charter granted by the state of Illinois; that at all of the times mentioned in plaintiff's petition this defendant was a fraternal beneficiary society as defined in, and duly transacting business in compliance with the provisions of an Act of the General Assembly of the State of Illinois, enacted and in force from and after the 22nd day of June, 1893, entitled:

"An Act to provide for the organization and management of fraternal beneficiary societies for the purpose of furnishing life indemnity or pecuniary benefits to beneficiaries of deceased members or accident or permanent indemnity disability to members thereof; and to control such societies of this State, and providing and fixing the punishment for violation of the provisions thereof, and to repeal all laws now existing which conflict herewith."

That Section I of said Act is as follows:

Section 1. Be it enacted by the People of the State of Illinois, represented by the General Assembly; That a fraternal Beneficiary society is hereby declared to be a corporation or association formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each society shall have a lodge system with ritualistic form of work and representative form of government, and shall make provision for the payment of death benefits and may, in addition thereto, provide for the payment by local Lodges [fol. 22] of benefits in case of sickness, disability, or old age, of its members, subject to their compliance with its constitution and laws. The fund from which the payment of such benefits shall be made, and the fund from which the expenses of such association shall be defrayed, shall be derived from assessments or dues collected from its members. Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon the member; and such benefits shall not be willed, assigned or otherwise transferred to any other person. All such societies shall be governed by this act, and shall be exempt from the provisions of all insurance laws of this state, and no law hereafter passed shall apply to them unless they be expressly designated therein."

Defendant further alleges that it is and was at all of the times in plaintiff's petition mentioned, a corporation formed, organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, having a lodge system, with ritualistic form of work and representative form of government, and makes provision for the payment of death benefits, subject to compliance by its members with its constitution and laws; that the fund from which the payment of such benefits is made, and the fund from which the expenses of the Society are defrayed is derived from assessments and dues collected from its members. That it makes payment of death benefits to the families, heirs, blood relations of, or to persons dependent upon its members.

Defendant further alleges that it now is, and was at all of the times in plaintiff's petition mentioned, transacting business as a fraternal beneficiary society in the State of Nebraska, and that it has at all times complied in all respects with the provisions and regulations of the laws of Nebraska, and is duly and regularly licensed to transact business in the State of Nebraska as a fraternal beneficiary society pursuant to said laws.

[fol. 23] Defendant further alleges that plaintiff's alleges cause of action is found on a contract made and entered into between Walter Crocker Mixer, mentioned in plaintiff's petition, and this defendant, which said contract is composed of (1) the charter and articles of association of Modern Woodmen of America and the statute of the State of Illinois in force at the time of the organization of the defendant and at all times thereafter, which are a part of said Charter of defendant, (2) the by-laws, rules and usages of Modern Woodmen of America in force at the time the said Walter Crocker Mixer be-

came a member of the defendant, together with all by-laws, laws, rules, and usages thereafter enacted by this defendant, (3) the application of said Walter Crocker Mixer for membership in this defendant, and (4) the Benefit certificate issued by this defendant to the said Walter Crocker Mixer, and herein sued on.

Defendant further alleges that on the 4th day of November, 1901, the said Walter Crocker Mixer made application for membership in the defendant through Forest Camp No. 1957 a subordinate lodge of this defendant located at Elk Point, State of South Dakota, and then and there filed a written application for membership, wherein he answered, warranted and agreed, among other things, as follows:

"I hereby make application for membership in your Camp and the Society of Modern Woodmen of America, and for indemnity in case of my death while a member in good standing of said Society in the sum of \$2,000.00.

I reside at Elk Point, State of South Dakota, and within the jurisdiction of the Camp above named, as defined in Sec. 231 of the By-Laws of said Society.

I was born in the State of Wisconsin on the 18th day of May, 1859, and therefore am now between 42 and 43 years of age. Are you married? Yes.

I agree to make payment of all due- and assessments legally levied, [fol. 24] within the limit of time provided by the Society's law and to conform in all respects to the laws, rules and usages of the Society now in force or which may hereafter be enacted and adopted by the same; and that this application and the laws of this Society shall form the sole basis of my admission to and membership therein, and of the Benefit Certificate to be issued me by said Modern Woodmen of America; and that any untrue statement or answer, or any concealment of facts, intentional or otherwise, in this application (including therein next succeeding page) or my being suspended or expelled from or voluntarily severing my connection with the Society, shall forfeit the rights of myself and that of my beneficiaries to any and all benefits and privileges growing out of my membership in said Society.

I am a believer in a Supreme Being. I fully understand the objects, organization, mode of government, and the laws of this Society, and particularly that part of the laws defining the qualifications for and the restrictions upon its membership, and that providing for the forfeiture of indemnity for untrue statements or answers in an application for membership. I further understand and agree that the laws of this Society now in force, or hereafter enacted, enter into and become a part of every contract of indemnity by and between the members and the Society, and govern all rights thereunder; and I further understand and agree that this Society does not indemnify against death from suicide, sane or insane, if occurring within three years from date of certificate, or from death resulting from occupations prohibited by its laws.

I direct that the Benefit Certificate which may be issued to me in

pursuance of this application, recite as beneficiaries the following named, and to each the amount designated, whose relationship to me I certify to be as stated, viz; \$2,000 to Jennie Vida Mixer, Elk Point, State of South Dakota. Wife.

I have verified each of the foregoing answers and statements from 1 to 28, both inclusive, adopt them as my own, whether writ-[fol. 25] ten by me or not, and declare and warrant that they are full, complete and, literally true, and I agree that the exact, literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and the Modern Woodmen of America, and are offered by me as a consideration for the contract applied for, and are hereby made a part of any Benefit Certificate that may be issued on this application, and shall be deemed and taken as a part of such certificate; that this application may be referred to in said Benefit Certificate as the basis thereof, and that they shall be construed together as one entire contract; and I further agree that if any answer or statement in this application is not literally true, or if I shall fail to comply with and conform to any and all of the laws of said Modern Woodmen of America, whether now in force or hereafter adopted, that my Benefit Certificate shall be void. And I waive for myself and beneficiaries all claim of benefit under this application until it shall be approved by the Head Physician and I shall be regularly adopted in accordance with the ritual of this Society, and shall make the payments as required by its laws at adoption; and any Certificate which shall be issued to me in pursuance of this application shall be delivered to me after adoption and while in sound health, and in pursuance of the By-Laws of the Society. And I hereby expressly waive for myself and beneficiaries the privilege of benefits of any and all laws which are now or may be hereafter in force making incompetent the testimony of or disqualifying any physician from testifying concerning any information obtained by him in a professional capacity. And I further expressly waive for myself and my beneficiary or beneficiaries the provisions of any law, and the statutes of any state, now in force or that hereafter may be enacted, that would, in the absence of this [fol. 26] agreement, modify or conflict with my contract with this Society, or cause it to be construed in any way contrary to its express language."

Defendant further alleges that the said application was the basis of, and consideration for, a certain benefit certificate, No. 842861, issued by this defendant to the said Walter Crocker Mixer on the 18th day of November, 1901, and thereafter delivered to and accepted by the said Walter Crocker Mixer, a copy of which said Benefit Certificate is attached to plaintiff's petition and marked Exhibit "A," and the same is hereby referred to and made a part of defendant's answer the same as if herein incorporated and repeated;

that said Benefit certificate has and contains, among other things, the following provisions, to-wit:

"The Modern Woodmen of America, a fraternal beneficiary society incorporated, organized, and doing business under the laws of the State of Illinois, hereby certifies; That Neighbor Walter Crocker Mixer, a member of Forest Camp, No. 1957 of the Modern Woodmen of America, located at Elk Point, in the County of Union and State of South Dakota, is, while in good standing, entitled to the privileges of this Society, and his beneficiary or beneficiaries hereinafter named shall, in case of his death while a beneficial member of this society in good standing, be entitled to participate in the benefit fund of this society to the amount of \$2,000 without interest, to be paid to the said beneficiary or beneficiaries, to-wit; Jennie Vida Mixer, related to said member in the relationship of wife; provided however, that all the conditions contained in this certificate and the by-laws of this society, as they now exist or may be hereafter modified, amended, or enacted, shall be fully complied with; and provided further, that in the event of the death of any beneficiary prior to the death of said neighbor, and upon his failure to designate another beneficiary, then the amount to be paid under [fol. 27] this certificate shall be due and payable to the other surviving beneficiaries, if any there by or if none survive him, then to the wife of such member if she survive him, or, in case he has no surviving wife, to his legal heirs. Said fund out of which any liability hereon, as well as all other mortuary liability shall be paid, shall be created by levying upon all beneficial members of this Society sufficient assessments from time to time to pay all such liability in full.

This benefit certificate is issued and accepted only upon the following express warranties, conditions, and agreements:

1. That the Modern Woodmen of America is a Fraternal Beneficiary Society, incorporated, organized, and doing business under the laws of the State of Illinois, and legally transacting such business in the state where said member resides. That the application for membership in this society made by the said member, a copy of which is hereto attached and made part thereof, together with the report of the Medical Examiner, which is on file in the office of the Head Clerk, and is hereby referred to and made a part of this contract, is true in all respects, and that the literal truth of such application, and each and every part thereof, shall be held to be a strict warranty and to form the only basis of the liability of this society to such member and to his beneficiary or beneficiaries, the same as if fully set forth in this benefit certificate.

3. This certificate is issued in consideration of the warranties and agreements made by the person named in this certificate in his application to become a member of this society, and also in consideration of the payment made when adopted as a neighbor in prescribed form, and his agreement to pay all assessments and dues

that may be levied during the time he shall remain a member of this society.

4. If payments assessed against the said member are not paid to the Clerk of the camp of which he is or hereafter may be a member on or before the first day of the month following the date of the notice of levy of the same, then this certificate shall be null and [fol. 28] void, and shall so continue of no effect until payment is made in pursuance of the requirements of the by-laws of this society as the same now exists, subject, however, to change from time to time, as the same may be affected by the enactment of new by-laws or the modification or amendment of any now in force.

6. No action can or shall be maintained on this certificate until after the proofs of death and claimant's right to benefits, as provided for in the by-laws of this society, have been filed with the Head Clerk and passed upon by the Board of Directors, now unless brought within eighteen months from the date of the death of the member."

Defendant further alleges that its by-laws duly and regularly enacted and in full force and effect at all times from and after the 1st day of September, 1908, have provided as follows:

"Sec. 66. Disappearance No Presumption of Death.—No lapse of time or absence or disappearance on the part of any member, heretofore, or hereafter admitted into the Society, without proof of the actual death of such member, while in good standing in the Society, shall entitle his beneficiary to recover the amount of his benefit certificate, except as hereinafter provided. The disappearance or long continued absence of any member unheard of, shall not be regarded as evidence of death or give any right to recover on any benefit certificate heretofore or hereafter issued by the society until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality, has expired within the life of the benefit certificate in question, and this law shall be in full force and effect, any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding. The term 'within the life of the Benefit certificate,' as here used, means that the benefit certificate has not lapsed or been forfeited, and that all payments required by the by-laws of the society have been made."

[fol. 29] Defendant further alleges that proof of the actual death of the said Walter Crocker Mixer has never been furnished to, or filed with the defendant and that the expectancy of life of the said Walter Crocker Mixer, according to the National Fraternal Congress Table of Mortality, had not expired at the time of the commencement of this suit, and has not expired and did not expire within the life of the said Benefit certificate herein sued on.

Defendant further alleges that under its Charter, granted by the State of Illinois, and under the laws of said state, it has authority

to adopt, alter, revise, and amend its by-laws; that ever since the organization and incorporation of this defendant, it was, and still is, the statute law of the state of Illinois that fraternal beneficiary societies, of which the defendant, Modern Woodmen of America, is one, may revise, alter and amend their by-laws; and that under and by the law of the State of Illinois as determined by its courts of competent jurisdiction, fraternal beneficiary societies, of which the defendant is one, have power to revise, amend and alter their by-laws; and that said revised and amended by-laws are binding upon the members thereof, and their beneficiaries; that the corporate power of the defendant, Modern Woodmen of America, and the plaintiff's rights, as well as the rights of any beneficiary depending upon the membership of Walter Crocker Mixer in defendant, are determined by the public acts of the State of Illinois, which authorize the defendant to alter, revise and amend its by-laws, and members of the defendant (including said Walter Crocker Mixer) and their beneficiaries are bound thereby; that under the statute law of the state of Illinois, as the same existed at all of the times herein mentioned, this defendant had the right and power to enact by-laws and said by-laws so enacted became a valid and existing part of the contracts between the Society and its members, and that the said Section 66 of defendant's by-laws so enacted, as aforesaid, was and [fol. 30] is a valid and existing part of the contract between the defendant and the said Walter Crocker Mixer, and binding upon the beneficiaries under his certificate; that pursuant to the provisions of Section 1, Article 4, of the Constitution of the United States, this Honorable Court is in duty bound to give full faith and credit to the public acts aforementioned of the State of Illinois, and to the interpretation thereof by the highest judicial court of the State of Illinois. And this defendant further alleges that if this Honorable Court should fail or refuse to hold that this defendant had the right to enact said by-laws (Sec. 66 aforesaid) and that the said by-law is valid and binding upon all the members of the defendant, including the said Walter Crocker Mixer, and their beneficiaries, there would be a failure on the part of this Honorable Court to give full faith and credit to the public acts of the State of Illinois and to the decision of the highest tribunal of said State, and that would be a violation of Section 1, Article 4, of the Constitution of the United States.

Defendant further alleges that on the 13th day of December, 1917, one Louisa W. Steen filed an action at law against this defendant, Modern Woodmen of America, in the Superior Court of Cook County, Illinois, and in her declaration for cause of action alleged that on the 15th day of January, 1897, this defendant issued a certain benefit certificate to one Albert F. Steen, payable on his death in the sum of \$2 000 to Louisa W. Steen, his wife, as beneficiary; that thereafter on, to-wit, the 7th day of May, 1910, the said Albert F. Steen disappeared from his home in the City of Chicago, Illinois, and that he had been unaccountably absent ever since, and had never returned or been heard of since his departure, though

the plaintiff had made diligent search and inquiry for him; that on, to-wit, the 7th day of May, 1917, said absence of Albert F. Steen had continued seven years and on said date the said Albert F. Steen was presumed to be dead, and that the said Steen Died, to-wit, on the [fol. 31] 7th day of May, 1917; that thereafter plaintiff gave the defendant notice of the disappearance and continued absence of said Albert F. Steen for more seven years, and made claim for the said \$2,000; that the said Albert F. Steen had paid all assessments and dues up to and including the month of May, 1917, and had complied in all respects with the constitution, by-laws and conditions of the said certificate, and was a mem' er in good standing of defendant society at the time of his death; that defendant refused to pay plaintiff's claim, wherefore plaintiff prayed judgment for the said sum of \$2,000 with interest from the 7th day of May, 1917.

Defendant further alleges that thereafter, on January 9, 1918, it filed a second or special plea to plaintiff's declaration alleging that it was a fraternal beneficiary society; that plaintiff's suit was founded on a contract entered into between Albert F. Steen and the defendant, which consisted of the application of Albert F. Steen for membership in the defendant society, the by-laws of Modern Woodmen of America and the benefit certificate issued to said Steen; that on the 22nd day of December, 1896, the said Albert F. Steen made application for membership in the defendant society through Muscatine Camp, No. 106, a subordinate lodge of the defendant, located at Muscatine, State of Iowa, wherein he agreed to conform in all respects to the laws, rules and usages of the Order then in force or thereafter enacted; that said application was the basis of and consideration for a benefit certificate, No. 72769, issued to said Steen on the 15th day of January, 1897, which provided that the said Steen, a member of Muscatine Camp No. 106, located at Muscatine, Iowa, "is while in good standing in this fraternity entitled to participate in its benefit fund to an amount not to exceed \$2,000, which shall be paid at his death to Louisa W. Steen, related to him as wife, subject to all the conditions of this certificate and by-laws of [fol. 32] this Order, and liable to forfeiture if said member shall not comply with said conditions, laws, and such by-laws and rules as are or may be adopted by the Head Camp of this Order from time to time." Said plea further alleged that by by-laws of the defendant, in force when said benefit certificate was issued, were subsequently amended and modified and from and after September 1, 1908, the by-laws contained Section 66 (as hereinbefore set forth), and the plea concluded with the allegation that proof of the actual death of said Steen had never been furnished to the defendant, and the expectancy of life of said Steen, according to the National Fraternal Congress Table of Mortality, had not expired.

Thereafter, on, to-wit, the 7th day of February, 1918, plaintiff filed a demurrer to defendant's said plea, alleging that said plea was not sufficient in law to constitute a defense to her action; that thereafter, on to-wit, the 1st day of June, 1918, the said Superior Court of Cook County entered the following judgment in said case of Louisa W. Steen vs. Modern Woodmen of America, to-wit:

"This cause coming on to be heard upon the demurrer of the plaintiff to the second or special plea of the defendant wherein the defendant sets up Section 66 of its by-laws providing that the disappearance or long continued absence of any member unheard of shall not be regarded as evidence of death or give any right to recover on any benefit certificate until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality, has expired within the life of the benefit certificate in question, and providing for proof of the actual death of a member, the said demurrer of the plaintiff to said special plea is hereby overruled, to which order of the court, the plaintiff, by her attorneys, object and excepts, and plaintiff elects to stand by her demurrer to said special plea.

It is hereby further ordered that said cause be and the same is hereby dismissed at plaintiff's costs.

Therefore it is considered by the court that the defendant go hence [fol. 33] without day and do have and recover of and from plaintiff its costs and charges in this behalf expended and have execution therefor, to which order and judgment of the court plaintiff objects and excepts, and prays an appeal to the Appellate Court of the First District of Illinois, which appeal is hereby allowed upon the plaintiff filing bond to be approved by this Court in the sum of two hundred dollars, within thirty days from this date and bill of exceptions to be filed and approved within sixty (60) days from this date."

Defendant further alleges that the said Louisa W. Steen perfected an appeal from said judgment to the Appellate Court of the First District of Illinois which thereafter, on to-wit, the 3rd day of April, 1920, filed an opinion and entered an order and judgment affirming the judgment of the Superior Court of Cook County, Illinois; and thereafter, on to-wit, the 17th day of May, 1920, said Appellate Court allowed a certificate of importance and appeal to the Supreme Court of Illinois; that thereafter, the said Louisa W. Steen perfected said appeal in the Supreme Court of the State of Illinois, which is the highest judicial tribunal of said state; that thereafter, on to-wit, the 21st day of December, 1920, the said Supreme Court of the State of Illinois filed an opinion in the said case of Louisa W. Steen vs. Modern Woodmen of America, which said opinion is reported in Volume 296 of the Illinois Reports, page 104, (129 N. E. 546) a full and true copy of which said opinion is filed herewith and made a part hereof and marked "Exhibit 1," whereby the said Supreme Court affirmed the judgment of the Appellate Court and held that said by-law, Section 66, is a reasonable and valid by-law and not contrary to public policy, and violates no contract rights of the certificate holders, and is binding upon the members of this defendant and their beneficiaries, and is entitled to be enforced. That thereafter the said Louisa W. Steen filed a petition for rehearing in the Supreme Court of Illinois, which said petition for rehearing was overruled and denied on February 3, 1921, and *and* said opinion thereupon be- [fol. 34] came final; that thereupon judgment was entered in said

Supreme Court in favor of this defendant affirming the judgment of said Appellate Court.

That the constitution and by-laws of this defendant and the contract rights between this defendant and its members, and the authority and power of this defendant under its charter and the statute law of the State of Illinois, as passed upon by the Superior, Appellate and Supreme Courts of the State of Illinois in the Steen case are the same as in this case; that one of the questions involved in this case is whether said Section 66 of defendant's by-laws is a valid by-law and binding upon the members of the Society and their beneficiaries, and that this was indentially the same question which was determined by the said Superior, Appellate and Supreme Courts in the Steen case referred to above. That this Honorable Court is in duty bound under provisions of Section 1, Article 4, of the Constitution of the United States to give full faith and credit to the statute law of the State of Illinois, aforementioned, and to the aforesaid judgment and decisions of the said Superior, Appellate and Supreme Courts in the Steen case, and if this Honorable Court should fail or refuse to hold that said by-law (Section 66 aforesaid) is a valid by-law and a valid and existing part of the contract between the said Walter Crocker Mixer and this defendant, and that the said Walter Crocker Mixer and the beneficiary under his said benefit certificate, herein sued on, and their rights under the said contract, herein sued on, are subject to the provisions of said by-laws, this would constitute a failure and refusal on the part of this Honorable Court to give full faith and credit to the public acts, records and judicial proceedings of the State of Illinois, and to the judgment and decision of the highest judicial tribunal of said State of Illinois, the place of this defendant's incorporation and domicile, con-truing the validity of [fol. 35] said by-law, and that would be a violation of Section 1, Article 4, of the Constitution of the United States.

That there has been on file with the proper authorities in the State of Nebraska since the 1st day of September, 1908, said By-Law No. 66, hereinbefore set out, and all other by-laws of the defendant, duly certified by the Secretary of said defendant Association, as provided by the laws of the State of Nebraska.

Wherefore, no right of action has accrued on said benefit certificate, and the defendant is not liable thereunder.

Division II

Defendant further answering, and for its second affirmative ground of defense to plaintiff's alleged cause of action, says that it is, and during all of the times in plaintiff's petition mentioned, has been a fraternal beneficiary society organized, incorporated and existing under and by virtue of the laws of the State of Illinois; that at all of the times in plaintiff's petition mentioned, this defendant was a fraternal beneficiary society as defined in, and duly transacting business in compliance with the provisions of an Act of the General Assembly of the State of Illinois, enacted and in force from and after the 22nd day of June, 1893, entitled

"An Act to provide for the organization and management of fraternal beneficiary societies for the purpose of furnishing life

indemnity or pecuniary benefits to beneficiaries of deceased members or accident or permanent indemnity disability to members thereof; and to control such societies of this State, and providing and fixing the punishment for violation of the provisions thereof; and to repeal all laws now existing which conflict herewith."

Section 1 of said Act is as follows:

"Section 1. Be it enacted by the People of the State of Illinois, represented in General Assembly: That a fraternal beneficiary society is hereby declared to be a corporation or association, formed or organized and carried on for the sole benefit of its members and their [fol. 36] beneficiaries, and not for profit. Each society shall have a lodge system, with ritualistic form of work and representative form of government, and shall make provision for the payment of death benefits and may, in addition thereto, provide for the payment by local lodges of benefits in case of sickness, disability or old age of its members, subject to their compliance with its constitution and laws. The fund from which the payment of such benefits shall be made, and the fund from which the expenses of such association shall be defrayed, shall be derived from assessments or dues collected from its members. Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife, of, or to persons dependent upon the members; and such benefits shall not be willed, assigned, or otherwise transferred to any other person. All such societies shall be governed by this act, and shall be exempt from the provision of all insurance laws of this State, and no law hereafter passed shall apply to them unless they be expressly designated therein."

Defendant further alleges that it is and was at all of the times in plaintiff's petition mentioned, a corporation formed, organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, having a lodge system with ritualistic form of work and representative form of government, and makes provision for the payment of death benefits, subject to compliance by its members with its constitution and laws; that the fund from which the payments of such benefits is made, and the fund from which the expenses of the society are defrayed is derived from assessments and dues collected from its members. That it makes payment of death benefits to the families, heirs, blood relations of, or to persons dependent upon its members.

Defendant further alleges that it now is, and was at all of the times in plaintiff's petition mentioned, transacting business as a fraternal beneficiary society in the State of Nebraska, and that it has at all times complied in all respects with the provisions and [fol. 37] regulations contained in the laws of the State of Nebraska, and was, and is duly and regularly licensed to transact business in the State of Nebraska as a fraternal beneficiary society pursuant to said laws.

Defendant further alleges that plaintiff's alleged cause of action is founded on a contract made and entered into between Walter

Crocker Mixer, mentioned in plaintiff's petition, and this defendant, which said contract is composed of (1) the charter and articles of association of Modern Woodmen of America and the statutes of the State of Illinois in force at the time of the organization of the defendant and at all times thereafter, which are a part of said Charter of defendant, (2) the by-laws, laws, rules and usages of Modern Woodmen of America in force at the time the said Walter Crocker Mixer became a member of the defendant, together with all by-laws, laws, rules and usages thereafter enacted by this defendant, (3) the application of said Walter Crocker Mixer for membership in this defendant, and (4) the benefit certificate issued by this defendant to the said Walter Crocker Mixer, and herein sued on.

Defendant further alleges that on the 4th day of November, 1901, the said Walter Crocker Mixer made application for membership in the defendant through Forest Camp 1957, a subordinate lodge of this defendant, located at Elk Point, South Dakota, and then and there filed written application for membership and for a Benefit Certificate in the sum of \$2,000, wherein he agreed to conform in all respects to the laws, rules and usages of the Society then in force or thereafter adopted, and that if he should fail to comply with and conform to any and all of the laws of the Society, then in force or thereafter adopted, his benefit certificate should be void.

Defendant further alleges that the said application was the basis of and consideration for a certain benefit certificate, No. 842861, [fol. 38] issued by this defendant to the said Walter Crocker Mixer on the 18th day of November, 1901, a copy of which said benefit certificate is attached to plaintiff's petition and marked "Exhibit A" and is herein sued on, and the same is hereby referred to and made a part of defendant's answer the same as if herein incorporated and repeated; that the said benefit certificate has and contains, among other things, the following provisions, to-wit:

"This Benefit certificate is issued and accepted only — the following express warranties, conditions and agreements:

7. No action can or shall be maintained on this certificate, unless brought within one year from the date of the death of said Neighbor."

Defendant further alleges that its by-laws in full force and effect from and after the first day of September, 1911, have provided that no action for recovery on a death based upon any benefit certificate, heretofore or hereafter issued by the society, can or shall be maintained unless brought within eighteen months from the date of death of the member.

Defendant further alleges that this action was not brought within eighteen months from seven (7) years subsequent to the Fall of 1910, wherefore said action cannot be maintained.

Wherefore, defendant having fully answered, prays that plaintiff's petition be dismissed and that it have a judgment for its costs herein.

Truman Plantz, Nelson C. Pratt, Attorneys for Defendant.

[fol. 39] Jurat showing the foregoing was duly sworn to by Nelson C. Pratt omitted in printing.

EXHIBIT 1 TO ANSWER

THOMPSON, J.:

Appellant filed her declaration in the superior court of Cook County against appellee, alleging that appellee is a corporation organized under the laws of this state for the purpose of providing death benefits to the beneficiaries of its members upon payment of certain assessments and compliance with certain requirements and conditions; that in 1897 appellee issued its benefit certificate to Albert F. Steen, which certificate named appellant as beneficiary; that on the 7th day of May, 1910, Albert F. Steen disappeared from his home in the City of Chicago and has been unaccountably absent ever since; that he left with the intention of returning the same day, but has never returned; that diligent and continuous search and inquiry have been made for him by appellant, but she has been and is wholly unable to find or locate him; that on the 7th day of May, 1917, the absence of Albert F. Steen had continued 7 years, and that Albert F. Steen was presumed by law to be dead; that Albert F. Steen died May 7, 1917; that appellant is the widow and beneficiary of deceased; that appellant notified appellee shortly after such disappearance and has since fully informed appellee concerning the [fol. 40] same; that October 15, 1917, appellant gave appellee notice in writing of the disappearance and absence and requested payment of benefits under the certificate; that all required dues and assessments have been fully paid on behalf of assured up to and including May, 1917; that at the time of Albert F. Steen's death he was a member in good standing in appellee.

To the declaration appellee filed a plea of general issue and a special plea. The special plea averred the issuance of a certificate to assured: that appellee is a fraternal beneficiary society; that it makes provisions for payment of death benefits in case of the death of members in good standing; that the contract in question consists of the application, the by-laws, and the benefit certificate; that at the time the assured made his written application for membership he contracted "to conform in all respects to the laws, rules and usages of the order now in force or which may hereafter be enacted and adopted by same, and that this application and the laws of this order shall form the sole basis of my admission to membership therein and of the benefit certificate to be issued me by said Modern Woodmen of America;" that in said application he was asked the following question and made the following answer:

7. Do you further understand that the laws of this order now in force or hereafter enacted enter into and become a part of every contract of indemnity by and between the members and the order and govern all rights thereunder? Answer. Yes."—that the by-laws inforce when the benefit certificate was issued were subsequently amended and modified, and from and after September 1, 1908, to the present time said by-laws have provided, among other things, in substance as follows:

"Sec. 64. Action on Certificates Must Be Brought Within Eighteen Months.—No action for recovery on a death claim based upon any benefit certificate heretofore or hereafter issued by this society can or shall be maintained until after the proofs of death and claimant's rights to benefits, as provided in these by-laws, shall have been filed with the Head Clerk and passed upon by the Board of [fol. 41] Directors, nor unless brought within eighteen months from the date of the death of the member.

"Sec. 66. Disappearance No Presumption of Death.—No lapse of time or absence or disappearance on the part of any member heretofore or hereafter admitted into the society, without proof of the actual death of such member while in good standing in the society, shall entitle his beneficiary to recover the amount of his benefit certificate, except as hereinafter provided. The disappearance or long continued absence of any member unheard of shall not be regarded as evidence of death or give any right to recover on any benefit certificate heretofore or hereafter issued by the society until the full term of the member's expectancy of life according to the National Fraternal Congress Table of Mortality has expired within the life of the benefit certificate in question, and this law shall be in full force and effect, any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding. The term 'within the life of the benefit certificate,' as here used, means that the benefit certificate has not lapsed or been forfeited and that all payments required by the by-laws of the society have been made."

The special plea of appellee further averred that proof of the actual death of Albert F. Steen has never been furnished to appellee, and that the expectancy of life of Albert F. Steen according to the National Fraternal Congress Table of Mortality has not expired. To this special plea appellant filed a general demurrer, which was overruled. She elected to stand by her demurrer, and the superior court entered judgment in favor of appellee, which judgment was on appeal affirmed by the Appellate Court for the First District. That Court granted a certificate of importance, and this further appeal has been prosecuted.

The only question presented by this appeal is the validity of [fol 42] Section 66 of appellee's by-laws. Appellant contends that this by-law is void because its meaning is uncertain, it is unreasonable, and it is against the public policy and established law of the state. An able and exhaustive brief has been filed by learned counsel for appellant urging their views on these points, and we give attention to the points in the order stated.

(1) Counsel argue, first, that this by-law is uncertain, unintelligible, and so incomplete as to make it incapable of enforcement without a further provision in the by-law, contending that the by-law fixes no date or age of the assured at which his expectancy of life shall begin to run. Unless it can be determined from the by-law at what age the member's life expectancy is to be calculated,

it must be declared void, for the length or duration of such expectancy must be determined by the age of the member at the time fixed by the by-law to begin, for it is a matter of common knowledge that the expectancy of life of a person varies with every succeeding year of life. It is important that the beneficiary shall in some way be able to tell how many years she will be required to pay dues after the disappearance of the member, so that she may determine the wisdom of keeping the certificate alive or of letting it lapse. We think it clear from a consideration of the by-laws and the apparent purpose for which it was passed that the age fixed at which the expectancy of life is to begin to run is the time of disappearance. The object of the by-law is to establish a rule of evidence in disappearance cases different from the 7 years' absence rule established by the common law. The rule of evidence sought to be established is that, when a member disappears and nothing is heard from him, he is presumed to live out his natural expectancy, and at the end of his natural expectancy he will be presumed to be dead, but not until that time has arrived. This natural expectancy is to be determined according to the National Fraternal Congress Table of Mortality, a table recognized by the insurance departments and the courts of practically every state in the Union. The by-law has but [fol. 43] one purpose and refers to but one time. The time to which it refers is the date of disappearance of the member, and under the by-law the member's expectancy of life must be determined from the age of the member on the date of his disappearance.

(2, 3) It is further contended that the word "actual," used in connection with the word "death," adds nothing to the meaning of the latter word, and reliance is placed upon the language in *Gaffney v. Royal Neighbors*, 31 Idaho, 549, 174 Pac. 1014, where the court, in passing on a by-law identical with the one under consideration, said:

"We are at a loss to determine what added force is given to the language by use of the word 'actual' in connection with the word 'death'. Every death is an actual death, and there is no such thing as constructive or presumptive death."

Much of the argument is based upon the theory that this by-law excluded proof of death by circumstantial evidence. We do not think the by-law subject to this construction. The law is well settled in this state that death may be proven by circumstantial evidence, and we do not consider that the by-law attacks in any way that established principle. We think, however, there is a clear distinction between the actual death and death presumed by 7 years' continued and unexplained absence. The word "actual" has a well-understood meaning. It is something real or actually existing as opposed to something merely possible. Actual death is death existing in fact as distinguished from a constructive or speculative death established by a rule of evidence brought into being by necessity. If a man is actually dead—that is, dead in fact—he has reached a permanent state so far as worldly affairs are concerned, and

his business can be settled accordingly. On the other hand, if his death determined under the 7 years' absence rule, he is dead only because the law establishes death for certain purposes. He may, in fact, be alive. Our statute on administration of estates recognizes [fol. 44] the distinction between actual death and presumptive death, and provides that before distribution of the estate of one presumed to be dead each distributee shall give bond conditioned to refund to such presumed decedent, if alive, all property received by such distributee. Hurd's Stat. 1917, p. 23. This by-law provided that appellee will not pay the amount provided in the benefit certificate until there is filed, in accordance with its laws, proof of death in fact, or proof that the member has lived out his full expectancy of life, calculated from the time the member was last known to be alive. Its provisions are clear and the by-law is not void for uncertainty.

(4-7) It is earnestly insisted by appellant that section 66 alters the contract of insurance, and is therefore unreasonable. The contract in this case is the application of the member, the constitution and by-laws of the society, and the benefit certificate issued by the society to the member, and all are to be construed together. *Fullenwider v. Supreme Council of Royal League*, 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239. A person who enters an association must acquaint himself with its laws for they contribute to the admeasurement of his rights, his duties and his liabilities. Where, as here, there is an express and clear reservation of the right to amend, he is bound to take notice of the existence and effect of that reserved power. The power to enact by-laws is inherent in every corporation as an incident of its existence. This power is a continuous one, and *on* one has a right to presume that by-laws will remain unchanged. Where the contract contains an express provision reserving the right to amend or change by-laws, it cannot be doubted that the society has the right so to do, and where in the contract of insurance it is provided that members shall be bound by the rules and regulations now governing the society or that may thereafter be enacted for such government and those conditions are assented to, and the member accepts the benefit certificate under the [fol. 45] conditions provided therein, it is a sufficient reservation of the right in the society to amend or change its by-laws. *Murphy v. Nowak*, 223 Ill. 301, 79 N. E. 112, 7 L. R. A. (NS) 393; *Supreme Council of Royal Arcanum v. McKnight*, 238 Ill. 349, 87 N. E. 299; *Pold v. North American Union*, 261 Ill. 433, 104 N. E. 4; *Apitz v. Supreme Lodge, Knights & Ladies of Honor*, 274 Ill. 196, 113 N. E. 63, L. R. A. 1917A, 183; *Supreme Lodge, Knights of Pythias v. Mims*, 241 U. S. 574, 36 Sup. Ct. 702, 60 L. Ed. 1179, L. R. A. 1916F, 919.

(8) The duly chosen and authorized representatives of the members alone are vested with the power of determining when a change is demanded, and with their discretion, generally speaking, courts cannot interfere. Were it otherwise, courts would control all benevolent associations, all corporations, and all fraternities. It is only

when there is an abuse of discretion and a clear, unreasonable, and arbitrary invasion of private rights that courts will assume jurisdiction over such societies or corporations. With questions of policy, doctrine, or discipline courts will not interfere. *Supreme Lodge, Knights of Pythias v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

(9) At the time this benefit certificate was issued there was a well-established rule of evidence in this state that the unexplained absence of a person from home without having been heard from for 7 years by those who would naturally have heard from him if he had been alive, although diligent efforts were made to find him, raised a presumption of death, unless the circumstances of the case were such as to account for his not being heard of without assuming his death. *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248; *Donavan v. Major*, 253 Ill. 179, 97 N. E. 231. This is an arbitrary presumption, rendered necessary on grounds of public policy, in order that rights depending upon life or death of persons long absent and unheard of may be settled by some certain rule. Jones, in volume 1 of his *Commentaries on Evidence*, #61, says:

[fol. 46] "Thayer, in his usual thorough way, gives an interesting and instructive account of the presumption, and fixes its application in its present form as of 1805, and that it appeared for the first time in the text-books in 1915, and was speedily followed by other eminent writers, ending in 1876 with Stephen. 'Here, then,' says Thayer, 'in 70 years we find the rule about a 7 years' absence (1) coming into existence in the form of a judicial declaration about what may or may not fairly be inferred by a jury in the exercise of their logical faculty, the particular period being fixed by reference to two legislative determinations in specific cases of a like question; (2) passing into the form of an affirmative rule of law requiring that death be assumed under the given circumstances. This is a process of judicial legislation, advancing what is a mere recognition of a legitimate step in legal reasoning to a declaration of the legal effect of certain facts.'"

(10) This legal presumption of death from 7 years' unexplained absence arose by analogy under two early English Statutes, the one exempting from the penalty of bigamy any person whose husband or wife should be continuously beyond the seas or should absent himself or herself for the space of 7 years together, and the other providing that persons in leases for lives who shall remain beyond the seas or absent themselves from the realm for more than 7 years shall, in the absence of proof to the contrary, be deemed naturally dead. That the rule in question is merely a rule of evidence is unquestioned, *Stevenson v. Montgomery*, 263 Ill. 93, 104 N. E. 1075, Ann. Cas. 1915C. 112. It is so treated by all the text book writers. It was a rule born of necessity, to prevent the prosecution for bigamy of a deserted spouse, on the one hand, and to settle the property affairs of the absentee on the other hand. It grew up in England at a time when travel was fraught with every danger

known to man and when means of communication were primitive. Since this rule of law was established the social aspects of our civilization [fol. 47] have been almost revolutionized. The improbability that accident, injury, sickness, or death could overtake a member of this society without information of the fact reaching his family and friends is very great. In case of need he scarcely could fail to find assistance among the million members of his own fraternity. Hospital, police, burial, and other records are collected and preserved in practically every state in this country and newspapers are published in every city and village, and, except for the reasons for which the law was originally established, there is now no sound reason for continuing the rule except that it has existed for so long a time that convenience makes it the best rule to follow where no other rule is established by statute or by agreement.

(11, 12) The contract in question here is insurance on life, and the one essential fact necessary to mature this contract is the death of the insured. The burden is on the beneficiary to prove this death. The rule of law which appellant invokes is a rule of evidence and relates to the manner and quantum of proof necessary to establish death. By the common law rule a finding of the death of the insured will be sustained on proof of seven years' continued absence without intelligence of such absent person. Under the by-law in question such proof is not sufficient unless the absence has continued for a period equal to the member's expectancy of life. There is no vested right in a rule of evidence, and parties may by contract change an established rule of evidence and provide that a different rule shall apply in determining controversies that may arise between the parties to the contract. *Roeh v. Business Men's Protective Ass'n.*, 164 Iowa, 199, 145 N. W. 479, 51 L. R. A. (NS) 221, Ann. Cas. 1915C, 813; *Lundberg v. Interstate Business Men's Accident Ass'n.* 162 Wis. 474, 156 N. W. 482, Ann. Cas. 1916D, 667, *Cobble v. Royal Neighbors*, (No. App.) 219 S. W. 118. In *Chicago, Burlington & Quincy Railroad Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278, we said:

[fol. 48] "No man or corporation has a vested right in the rules of evidence. They pertain to the remedies provided by the state for its citizens, and do not constitute a part of any contract."

To the same effect is our holding in *People v. Rose*, 207 Ill. 352, 69 N. E. 762, and in *Chicago Transfer Railroad Co. v. City of Chicago*, 217 Ill. 343, 75 N. E. 499.

The average duration of human life after any given age being now ascertained and stated in well-authenticated tables, which have been recognized by the courts as safe rules in the calculation of the value of annuities and in other similar cases, no good reason is perceived why the same tables may not be accepted as furnishing ground legally to presume the death of a person after the lapse of the period of probable duration of his life, in the absence of any evidence to the contrary. These tables are scientifically made from actual experience in dealing with a given number of human lives at a given age. As we have said, the presumption of death on ac-

count of 7 years unexplained absence is an arbitrary rule, established by necessity, and has no basis in fact or in experience. The purpose of the by-law under consideration is not to do away with presumption of death on account of disappearance and continued absence, but is to substitute certainty for uncertainty, to displace guess work by science, and to supplant groundless conjecture by actual experience. The record shows that Albert F. Steen was born in 1870 and joined the society in 1897. He was then 27 years of age, and according to the National Fraternal Congress Table of Mortality, his expectation of life was then 40.2 years. He disappeared in 1910 and was then 40 years of age. According to the same table his expectation of life was then 29.9 years. This by-law, it will be seen, does not oust the courts of jurisdiction nor destroy the cause of action. In the instant case it merely delays the cause. Suppose, however, the member has been 74 years of age when he disappeared. Then, according to the table adopted by the by-law, his expectancy of life would have been seven years, and under those circumstances the rule fixed by the by-law and the common-[fol. 49] law rule of evidence would have established death at exactly the same time; but, if the member had been 79 years of age at the time of his disappearance, his natural expectancy of life would have been five years, or, if he had been 85 years of age at the time of his disappearance, his expectancy would have been 3 years, and if he had been 96 years of age, his expectancy would have been one year. Under these circumstances it will be noted that the by-law provides a rule of evidence much more favorable to the beneficiary than the common-law rule. The rule of evidence established by this by-law is for the mutual benefit of all the million members of this society. The insured had the benefit of this agreement as well as all other members, and his beneficiary must share its burdens. Parties have a right to agree as to what proof of death shall be furnished before the policy is payable. Appellee, as a legal entity, has no interest in this matter apart from its membership because it is a society organized not for profit. The unjust losses that might be paid under the common-law 7 years' absence rule would fall on the members of the society. Appellee merely distributes the funds which are collected from the members. Where the common-law rule is invoked for the purpose of settling the title to property by administration or succession, there is no incentive for the absentee to purposely absent himself and conceal his whereabouts, but rather the reverse. A by-law similar to the one challenged has been sustained in *Cobble v. Royal Neighbors*, supra; in *McGovern v. Brotherhood of Locomotive Firemen & Engineers*, 31 Ohio, Cir. Ct. 243, affirmed by the Supreme Court without an opinion, 85 Ohio, St. 480, 98 N. E. 1128; in *Kelly v. Catholic Mutual Benefit Assn.*, 46 App. Div. 79, 61 N. Y. Supp. 394; and in *Porter v. Home Friendly Society*, 114 Ga. 937, 41 S. E. 45.

A disappearance by-law much more drastic in its terms was held valid by this court in *Apitz v. Supreme Lodge, Knight & Ladies of Honor*, supra. The by-law there sustained provided that if a relief

[fol. 50] fund member disappeared from his home and nothing was heard from him by his family or the secretary of his lodge and no information could be had concerning him after diligent inquiry, and such disappearance continued for the period of one year, said member stood suspended as in case of suspension for non-payment of assessments. Under a by-law like the one in the Apitz case the beneficiary would have no right to continue payment of the assessments in order to keep the certificate alive, and if the member should reappear any time after the close of the first year's absence and should be unable to comply with the requirements of the society for reinstatement of members suspended for nonpayment of assessments, then all rights under the contract would be lost. Under such a by-law, if a member between the ages of 75 and 96 disappeared and no intelligence of him was received for 7 years, the beneficiary would not only lose the right to establish her case under the common-law 7 years absence rule, but would have no rights under the by-law. Under the by-law now being considered, if such a member disappeared the beneficiary could establish her case by proof of absence covering the member's expectancy of life, which would in all instances be less than 7 years. In that case we held that the beneficiary has no vested interest in a benefit certificate, and where the contract between the member and the society reserves the right to the society to amend or change the by-laws, and the member agrees to be bound thereby and accepts the certificate under these conditions, subsequently enacted by-laws are binding upon him. A by-law similar to the one held valid in the Apitz case was sustained by the Supreme Court of Maryland in *Royal Arcanum v. Vitzthum*, 128 Md. 523, 97 Atl. 923, L. R. A. 1917A, 179. That by-law was even more drastic in that it forfeited the certificate after 6 months' absence and failure to report.

(13) We think any provision of a contract which tends to prevent unjust and fraudulent claims should be upheld. No insurance [fol. 51] society could exist on reasonable rates if the face of the straight life policy were due to become due at the end of 7 years. As applied to life insurance, the common-law 7 years absence rule is without reason and is based neither on fact nor experience. While the common-law rule will be enforced where the parties have not contracted otherwise, we think it not only reasonable, but entirely sound from a business standpoint, that the parties should contract to establish death in disappearance cases in accordance with tables scientifically made from experience. This by-law does nothing more than change a rule of evidence, and in that respect it is equally as reasonable as the by-laws approved in *Roch v. Business Men's Protective Ass'n* supra, and *Lundberg v. Interstate Business Men's Accident Assn* supra. It is equally as reasonable as by-laws passed subsequently to issuing the benefit certificate and forfeiting the benefit when the insured changes his employment by certain prohibited occupations or commits suicide, and such by-laws have been sustained.

It is further urged that the by-law is void because it is against the public policy and established law of the state. In *Zeigler v.*

Illinois Trust & Savings Bank, 245 Ill. 180, 91 N. E. 1041, 28 L. R. A. (N. S.) 1112, 19 Ann. Cas. 127, we said:

"There is no precise definition of public policy, and consequently no absolute rule by which a contract can be measured or tested to determine whether or not it is contrary to public policy. Each case, as it arises, must be judged and determined according to its own peculiar circumstances. The public policy of the state or of the nation is to be found in its constitution and in its statutes, and when cases arise concerning matters upon which they are silent then in its judicial decisions and the constant practice of the government officials."

"It is clearly to the interest of the public that persons should not be unnecessarily restricted in their freedom to make their own contracts, and therefore agreements are not to be held void as being contrary to public policy unless they are clearly contrary to [fol. 52] what the legislature or judicial decision has declared to be the public policy or they manifestly tend to injure the public in some way," 13 Corpus Juris 437.

(14) We think the authorities generally agree that a contract is not void as against public policy unless it is injurious in some way to the interest of society. Surely a contract which tends to prevent the payment of fraudulent or fictitious claims is not injurious to society. The member, Albert F. Steen, had the benefit of this by-law in that it protected the Benefit fund from being weakened by the payment of fraudulent or fictitious claims, and his beneficiary must assume the burdens of the same contract under which she is indirectly benefited. The courts must act with care in extending those rules which say that a given contract is void because against public policy, since, if there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred and shall be enforced by the courts.

(15) Because a contract may waive constitutional or statutory rights or may change an established rule of law does not necessarily render it void on the ground that it is against public policy. In *Peoria Marine & Fire Ins. Co. v. Whitehill*, 25 Ill. 382 (original edition, p. 466), this court held that an insurance company had the right in its policies to limit the time in which an action should be brought for a loss, and that the by-law was not against public policy simply because it fixed a period less than that fixed by the statute of limitations. In *Pacaud v. Waite*, 218 Ill. 138, we held that parties may make valid and binding agreements to submit questions in dispute to the arbitrament of persons or tribunals other than the legally organized courts, and in *Deibeikus v. Link Belt Co.*, 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, this court laid down the rule that a contract waiving the constitutional right of a trial [fol. 53] by jury was not against public policy.

(16) Much that we have said regarding the reasonableness of this by-law applies with equal force to the objection now being consid-

ered. The purpose of this by-law is to protect the members and their beneficiaries by protecting the benefit fund against doubtful and unjust claims. The time when a disappeared member will be presumed to be dead is based upon the actual experience of human life as shown by a standard table of mortality. We do not see how it can reasonably be said that a rule of evidence based upon human experience, rather than upon necessity and convenience, is contrary to public policy.

The Supreme Courts of other states passing upon this by-law, or others identical with it, have come to a conclusion directly opposed to the one we have reached. *Haines v. Modern Woodmen* (Iowa) 178 N. W. 1010; *Garrison v. Modern Woodmen* (Neb.) 178 N. W. 842; *Sweet v. Modern Woodmen*, 169 Wis. 462, 172 N. W. 143; *Gaffney v. Royal Neighbors*, 31 Idaho, 549, 174 Pac. 1014; *Hannon v. United Workmen*, 99 Kan. 734, 163 Pac. 169, L. R. A. 1917C, 1029. These are well considered opinions, but we think the conclusion reached in them violated sound and well-settled principles of law, and we cannot adopt the views expressed by these able and distinguished courts.

For the reasons hereinbefore stated, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

[File endorsement omitted]

DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

DEMURRER—Filed November 7, 1921

[fol. 54] Comes now the defendant in the above entitled cause and demurs to the petition of plaintiff for the reason that said petition does not state facts sufficient to constitute a cause of action.

Modern Woodmen of America, by Nelson C. Pratt, Its Attorney.

[File endorsement omitted]

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

JOURNAL ENTRY

Now on this 21st day of November, A. D. 1921, it being a day of the regular September term of this court this cause came on for hearing and on agreement of parties a Jury is waived.

— — —, Judge.

[File endorsement omitted]

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

ORDER WAIVING JURY

[fol. 55] Now to wit, on this 21st day of November, 1921, it being a regular day of this Court, both the plaintiff and attorney came into Court and waived the right to try said case before a jury.

It is therefore ordered that this case be tried before the Court without a jury.

Guy T. Graves, Judge of the District Court within and for
Dakota County, Nebraska.

[File endorsement omitted]

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

REPLY—Filed January 10, 1922

Comes now the plaintiff and for reply to the answer filed by the defendant herein, denies each and every allegation of new matter set out in said answer.

The plaintiff demurs to Division One (1) of defendant's answer for the following reason:

1. That Division One (1) of said answer does not state facts sufficient to constitute a defense.

The plaintiff demurs to Division Two (2) of said answer filed herein for the following reason:

2. That Division *One* (1) of said answer does not state facts sufficient to constitute a defense.

Wherefore plaintiff prays that the answer of the defendant may be dismissed and she recover the amount as set out in the prayer of her petition.

Geo. W. Leamer, Attorney for Plaintiff.

[fol. 56] Jurat showing the foregoing was duly sworn to by Jennie Vida Mixer omitted in printing.

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

DECREE

Now to-wit, on this 10th day of January 1922, it being a regular day of this Court this cause came on to be heard upon the petition, the answer and reply filed herein, the plaintiff appearing in person and by her attorney, Geo. W. Leamer and the defendant appearing by its attorney, Nelson C. Pratt. The demurrer to Division 1 of the defendant's answer being the first affirmative ground of defense and Division 2 of defendant's answer being the second ground of affirmative defense came on to be heard and the Court being duly advised in the premises finds that the demurrer to the first affirmative defense of defendant, being Division 1 of its answer and also the demurrer to the second affirmative defense, being Division 2 of defendant's [fol. 57] answer, should be sustained. The court finds that divisions 1 and 2 of the answer presents no Federal question.

It is therefore ordered, adjudged and decreed by this Court that said demurrer to the first affirmative defense of defendant, designated as Division 1 in its answer, and the second affirmative defense of defendant, designated as Division 2 of its answer, is sustained and the defendant having elected to stand on its answer and declining to plead further.

It is further ordered, adjudged and decreed that Division 1 and Division 2 of the answer of said defendant be dismissed.

Now at this time the plaintiff introduced her evidence and rested. The defendant introduced no evidence. The Court being duly advised in the premises finds that all the allegations of the petition of plaintiff to be true; that said Walter Cro-ker Mixer has been absent from his home and place of residence for over seven (7) years, last past; and said absence has been continued and unexplained and that by reason of said fact said Walter Cro-ker Mixer is presumed to be dead and is hereby declared to be dead. That judgment should be entered as prayed for in said petition and that there is due the plaintiff from the defendant the sum of \$2,046.65.

It is therefore ordered, adjudged and decreed by this Court that the plaintiff recover of and from the defendant the sum of \$2,046.65 and the costs of this action, taxed at \$—. To all of which rulings of the Court the defendant excepts.

Guy T. Graves, Judge of the District Court within and for Dakota County, Nebraska.

[File endorsement omitted]

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

MOTION FOR NEW TRIAL—Filed January 10, 1922

[fol. 58] Comes now the defendant and moves the Court to set aside the judgment in the above-entitled cause and for a new trial, for the following reasons:

1. The verdict is not sustained by sufficient evidence.
2. The verdict is contrary to law.
3. Errors of law occurring at the trial duly excepted to.
4. The Court erred in sustaining the demurrer of plaintiff to defendant's first affirmative ground of defense.
5. The Court erred in sustaining plaintiff's demurrer to defendant's second affirmative ground of defense.
6. The Court erred in finding for the plaintiff and against the defendant.
7. The Court erred in rendering judgment for the plaintiff.
8. The Court erred in holding that it was not controlled by the laws of the State of Illinois.
9. The Court erred in holding that the full faith and credit clause of the Constitution was not violated by not following the laws and the decisions of the State of Illinois.

Nelson C. Pratt, Attorney for Defendant, Modern Woodmen of America.

DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

[Title omitted]

ORDER REFUSING NEW TRIAL

[fol. 59] Now to-wit, on this 10th day of January, 1922, it being a regular day of this Court the motion for a new trial in this cause came on to be heard and the Court being duly advised in the premises finds that said motion for a new trial should be overruled.

It is therefore ordered, adjudged and decreed that the motion for a new trial in this cause be and is overruled; and to all of which rulings of the Court the defendant excepts and is given 40 days from the rising of this Court to prepare and serve the bill of exceptions.

Guy T. Graves, Judge of the District Court.

SUPERSEDEAS BOND ON APPEAL FOR \$4,118.90—Approved and filed
January 24, 1922; omitted in printing

[fol. 60] **STATE OF NEBRASKA,**
County of Dakota, ss:

CLERK'S CERTIFICATE

I, George J. Boucher, Clerk of the District Court in and for Dakota County, Nebraska, do hereby certify that the foregoing is a full and true transcript of the proceedings and record had in the case in the District Court, containing the Petition, Answer, Reply, Demurrers, Ruling on Demurrers, Judgment, Motion for a New Trial, Order Overruling the Motion for a New Trial, and Supersedeas Bond, of Jennie Vida Mixer vs. Modern Woodmen of America, appearing of record in said Court.

I do further certify that the Bill of Exceptions hereto attached and [fols. 61 & 62] made a part of this transcript was attached by me, and is the original Bill of Exceptions filed in the office of the Clerk of said Court in the above entitled action.

In witness whereof I have hereunto set my hand and affixed the seal of said Court, at Dakota City, this 14th day of February, A. D., 1922.

Geo. J. Boucher, Clerk of the District Court. (Seal.)

[File endorsement omitted.]

[fol. 63] **IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA**

[Title omitted]

Bill of Exceptions Before the Honorable Guy T. Graves, Judge—
Filed February 7, 1922

[fol. 64] **STATE OF NEBRASKA,**
Dakota County, ss:

I, George J. Boucher, Clerk of the District Court of the Eighth Judicial District of the State of Nebraska in and for said County, do hereby certify that this is the original Bill of Exceptions filed in my office, in the cause in said Court wherein Jennie Vida Mixer was plaintiff and the Modern Woodmen of America was defendant.

Witness my signature and official seal this 14th day of February, A. D., 1922.

Geo. J. Boucher, Clerk of the District Court. (Seal.)

[fols. 65 & 66] STIPULATION AND ORDER SETTLING BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between the parties hereto, that the following transcript is a true and complete copy of all the evidence, oral or documentary, introduced on the trial of the within entitled cause by either party, together with all the objections of counsel thereto, the rulings of the court on said objections, and exceptions taken thereto.

Dated Feb. 7, 1922.

Geo. W. Leamer, Attorney for Plaintiff. Nelson C. Pratt, Attorney for Defendant.

I hereby certify that the within record now contains all the evidence offered or given upon the trial of the within cause by either party, together with all objections thereto, rulings thereon, and exceptions to such rulings, and on application of Modern Woodmen of America, the defendant, this bill of exceptions is hereby allowed, by me, and ordered to be made a part of the record in this case.

Dated Feb. 7, 1922.

Guy T. Graves, District Judge.

[fols. 67 & 68] PLAINTIFF'S EXHIBIT 1, PHOTOSTATIC COPY OF BENEFIT CERTIFICATE ISSUED TO W. C. MIXER—
Omitted in printing.

[fol. 69] OFFERS IN EVIDENCE

Mr. Leamer: The plaintiff now offers in evidence Plaintiff's Exhibit 1.

Mr. Pratt: The defendant objects to the offer made for the reason that it is incompetent, irrelevant and immaterial. It does not ground that upon the fact that it has not been identified.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 1 was thereupon received in evidence and the original thereof follows, attached to Page 3 of this bill of exceptions.

Mr. Leamer: Plaintiff offers in evidence Exhibit 2, in two parts.

Mr. Pratt: The defendant admits that it received this paper, Exhibit 2, with accompanying letter, from counsel for plaintiff on the date stated on the face of the paper which was March 14, 1921.

The defendant objects to the paper for the purpose of supplying the death proofs in this case; incompetent, irrelevant and immaterial.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 2 was thereupon received in evidence, and the original thereof follows, constituting pages 5, 6, 7 and 8 of this bill of exceptions.

[fol. 70]

PLAINTIFF'S EXHIBIT 2

STATE OF NEBRASKA,
County of Dakota, ss:

Mor. Mar. 14, 1921.

I, Jennie Vida Mixer of lawful age, being first duly sworn deposes and says that she was the wife of Walter Crocker Mixer, and the beneficiary under benefit certificate number 842,861 of the Modern Woodmen of America, a Fraternal Beneficiary Society; that the said Walter Crocker Mixer was a member of the Forrest Camp, number 1957 of the Modern Woodmen of America at Elk Point, Union County, South Dakota, and said benefit certificate was dated November 18, 1901, and was for the amount of \$2,000.00.

Affiant further states that the said Walter Crocker Mixer disappeared in the month of December, 1910, and last heard from by his wife or any person was in the month of February, 1911, when he wrote that he was in a hospital at Midland, South Dakota; that said affiant and her family have made inquiries and have never heard where the said Walter Crocker Mixer is or where he went to from there since February, 1911.

Affiant further states that she has paid all assessments and dues under and by virtue of such benefit certificate, and that the said Walter Crocker Mixer has been absent from his home continuously, and his whereabouts have not been known since the month of February, 1911.

Affiant, Jennie Vida Mixer, who is the beneficiary under said benefit certificate respectfully claims the \$2,000.00 dues under said certificate and asks that the same be paid to her; that she has said benefit certificate in her possession and is ready to surrender the same upon said payment.

Jennie Vida Mixer.

Pl'tf's Exhibit No. 2. Jennie Vida Mixer vs. Modern Woodmen.
Robert G. Fuhrman, Reporter.

[fol. 71] Subscribed in my presence and sworn to before me this 8 day of March, 1921. Geo. W. Leamer, Notary Public. My Commission expires June 12, 1922. (Seal.)

Geo. W. Leamer, Lawyer, Dakota City, Neb.; County Attorney,
Dakota City, Neb.

Registered package.

March 11, 1921.

Mor. Mar. 14, 1921.

Mar. 14, 1921.

Modern Woodmen of America, Rock Island, Ill.

GENTLEMEN: Please find enclosed affidavit in regard to the disappearance and death of Walter Crocker Mixer, who holds a benefit certificate under you- soci-ty.

The Beneficiary, *Jennie Vida Mixer*, has been to my office and she is now making a claim for this amount of money under the law in our State that seven years' absence of a person raises the presumption of death.

We have had sent to us blanks of proof of death, but under the circumstances it is impossible for us to fill out and sign those proofs. We have set out in this affidavit the necessary facts showing his absence and we respectfully ask that you submit this to the proper authorities and allow the same.

Please let me hear from you at your earliest convenience.

Very truly yours, Geo. W. Leamer.

GWL/OL. Enc. #1.

[fol. 72] Mr. Leamer: We offer in evidence Exhibit 3 as the evidence of F. L. McClure if he was present here in court to testify.

There being no objection, Exhibit 3 was thereupon received in evidence, and the original thereof is attached to this bill of exceptions, immediately following this page, and constitutes Page 10 of this bill of exceptions.

The defendant thru its counsel, thereupon in open court made the following admission:

It is admitted that the statement of F. L. McClure, Plaintiff's Exhibit 3, was made on July 31, 1919.

The following stipulation was thereupon entered into, in open court, by the parties, thru their respective counsel:

It is stipulated between the parties to this action that the person referred to as W. C. Mixer by F. L. McClure in Plaintiff's Exhibit 3, is the same person as Walter Crocker Mixer, referred to in Plaintiff's Exhibit 1.

PLAINTIFF'S EXHIBIT 3

7/31-19.

Re W. C. MIXER

Statement of F. L. McClure

I, F. L. McClure, state that I was acquainted with W. E. Mixer and knew him 3 years before he disappeared, as he was employed by F. L. McClure & Company, wholesale Grocers at Sioux City, Iowa, I being the F. C. McClure of this firm.

W. C. Mixer was short in his accounts with me twice, and disappeared each time.

The first time he was short was for about \$1,100 in collections. He left \$300 with his wife or sister and they turned it in to me. I had his wife have him come back and take up his old work—she was in touch with him, and he said he had lost the money out of his pocket. The last time he disappeared he made collections for about \$900. Left our team and buggy in a livery stable and has never been heard of by us.

F. L. McClure.

[fol. 73] JENNIE VIDA MIXER, the plaintiff, being called as a witness in her own behalf, and regularly sworn, testified as follows:

Direct examination by Mr. Leamer:

1 Q. What is your name?

A. Jennie Vida Mixer.

2 Q. You are the plaintiff in this action?

A. I am.

3 Q. And you were married to Walter Crocker Mixer?

A. Yes sir.

4 Q. The person referred to in Plaintiff's Exhibit 1?

A. Yes sir.

5 Q. When was the last time you saw Mr. Mixer?

A. Just before Thanksgiving, I could not say whether it was two or three days before Thanksgiving, in 1910.

6 Q. Where was that at?

A. At our home in Jackson.

7 Q. Jackson, Nebraska?

A. Yes sir.

8 Q. You were living there?

A. We were living there.

9 Q. How long had you lived there before this?

A. I don't remember just when we moved there.

10 Q. Well about how long?

A. Oh, it was about fifteen years, sixteen.

11 Q. How long have you and Mr. Mixer been married, what year were you married?

A. In 1898, November.

12 Q. And you lived together up to Thanksgiving, a few days before Thanksgiving, 1910?

A. Yes sir.

13 Q. Do you know where Mr. Mixer went to then?

[fol. 74] A. He went into South Dakota on his line of travel.

14 Q. Who was he working for?

A. F. L. McClure, or The Western Wholesale Supply, I think was the name at that time.

15 Q. That is the same F. L. McClure who signed the statement in this case?

A. Yes, F. L. McClure was the Manager.

16 Q. Where did you hear from him in South Dakota?

A. I heard from him at Midland, and the other places I don't remember now.

17 Q. How did you hear from him?

A. By letter.

18 Q. And did he write to you under his own name or an assumed name?

A. Well he usually signed his name either Papa or Walter, he didn't sign his full name.

19 Q. Did he tell you where to write to?

A. The last letters were to be addressed to an assumed name.

20 Q. At what place were you to address the letters?

A. At Midland, and Austin, Minnesota was the last place given.

21 Q. Did you write him at Austin, Minnesota?

A. I did.

22 Q. And did you hear from him?

A. I received no answer.

23 Q. Did you receive your letter back?

A. I did.

24 Q. Have you that letter?

A. No I haven't.

25 Q. Have you got any of the letters that you wrote to him?

A. I have just one, I was in the habit of burning them all just as soon as they came, because they were in the way.

26 Q. Mrs. Mixer do you recall where it was you sent a letter to Mr. Mixer and it came back to you?

A. I sent one to Midland.

[fol. 75] 27 Q. Handing you Plaintiff's Exhibit 4 I will ask you if that is a letter which you wrote to Mr. Mixer and it came back to you?

A. Yes this is one that I wrote and it came back.

28 Q. What town did you address that to?

A. Well I cannot say. I didn't know until just a few months ago that I had this letter, I found it in some pictures that I had put away in an old trunk.

29 Q. You have no letters that he wrote you?

A. I have no letters at all, and just by chance that I had this one.

30 Q. He first wrote to you at Midland, South Dakota, as I understand it?

A. Well, that is the first place that I remember of him giving me the address to write to him.

31 Q. Where was the last address that he gave you to write to him?

A. Austin, Minnesota.

32 Q. And did you write to him at Austin, Minnesota?

A. I did.

33 Q. And your letter was returned?

A. My letter was returned. I also wrote to the Postmaster asking him if a person under this name received mail there and he sent me a printed notice that the Postmasters were not allowed to give information, but that I could send a letter with a return date and it would be held until called for or until the expiration of the time, and I did that with- thirty days and that letter came back.

34 Q. The letter on which you put a thirty day return?

A. Yes, it came back to me.

35 Q. When was that? Or when did you last hear from Mr. Mixer?

A. February 4, 1911.

36 Q. Where did you hear from?

A. That was from Midland.

37 Q. And you never heard from him since?

A. No sir.

38 Q. Have you directly or indirectly heard from him?

[fol. 76] A. I have not.

39 Q. You have received no letters?

A. No letters, or any information.

40 Q. And you haven't seen him?

A. No.

41 Q. Have you inquired of his relatives whether they have heard from him?

A. I have, and the understanding always was from the time that he left that if they ever heard they were to let me know, I was to hear right away if they ever heard from him, and they have never heard anything about him, for they have not notified me about it.

42 Q. You have written the different brothers and sisters?

A. The one brother I don't know, I haven't written to him, but the two sisters, in fact one sister I saw at different times during the time he has been gone, the one that used to be at Fremont.

43 Q. Mr. Mixer has a sister at Fremont?

A. Did have, she is at Columbia this year.

44 Q. Going to school?

A. Yes sir.

45 Q. Has he other sisters?

A. He has one sister at Rockford, Illinois.

46 Q. And any other sisters?

A. No.

47 Q. Any brothers?

A. Just the one brother in Colorado.

48 Q. Have you ever heard from him?

A. No I haven't.

49 Q. In no way?

A. My daughter corresponds with one of his girls, but I never knew the family at all.

50 Q. Do you know why Mr. Mixer left Mr. McClure's firm?

A. No I do not.

51 Q. Have you ever talked with Mr. McClure about it?

[fol. 77] A. I did.

52 Q. He told you?

A. He told me that he was short in his accounts.

53 Q. He left once before this time didn't he?

A. Yes.

54 Q. How long was he gone that time?

A. Oh, he was away about six weeks, I really don't remember the exact time.

55 Q. And he came back?

A. Mr. McClure and I coaxed him to come back and take up his work again.

56 Q. He wrote to you all the time he was gone these six weeks?

A. He wrote to his sister and his sister forwarded to me.

57 Q. But you were in communication with him?

A. Yes sir.

58 Q. Previous to this time had he ever left home that way?

A. No.

59 Q. You had lived together all the time since you were married except for the six weeks he was gone?

A. Yes.

60 Q. And you haven't heard anything from him since February, 1911?

A. No I haven't.

61 Q. And you have been in correspondence with the sisters most all the time?

A. Well I did correspond with the one in Rockford, but my daughter corresponded all the time with her, and so I heard from here and the one at Fremont I visited her several times.

62 Q. You wrote some letters to the Modern Woodmen of America about the disappearance of Mr. Mixer?

A. I did.

63 Q. And you had correspondence with them?

A. Yes sir.

64 Q. I think at one time you wanted his picture put in their paper?

A. Yes sir.

[fol. 78] 65 Q. And they refused to put it in?

A. Yes sir.

66 Q. Do you remember what year it was you had that correspondence?

A. Well I think it was in 1912 or 13, I am not positive.

67 Q. Did you have somebody write to the Modern Woodmen of America for you or did you write yourself?

A. Mr. Kearney carried on the correspondence, for me, Mr. Ed. T. Kearney, the banker.

68 Q. You received some correspondence direct from them concerning this?

A. Well they were sent to Mr. Kearney and then given to me. I might have received one or two direct from the office.

69 Q. Handing you Plaintiff's Exhibit 5 I will ask you if you received that letter from the Modern Woodmen of America?

A. Yes, I received this one.

Mr. Leamer: We offer in evidence Plaintiff's Exhibit 5.

Mr. Pratt: Objected to for the reason that it is immaterial.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 5 was thereupon received in evidence, and the original thereof is attached to this bill of exceptions following, constituting Page 19 hereof.

Mr. Leamer: We offer in Evidence Plaintiff's Exhibit 4.

There being no objection, Plaintiff's Exhibit 4 was received in evidence, and the original thereof is attached to this bill of exceptions following, constituting Page 20 hereof.

[fol. 79]

PLAINTIFF'S EXHIBIT 4

Jackson, Neb., Dec. 15, 1910.

DEAR PAPA: Your letter received telling us to write you at Pierre. This leaves us all able to eat so guess we are not very badly off—

I think Minnie & Seba have had the chicken pox but they are all right now. They felt sick a little for one day—I suppose the other two will come next—Frances had a little sick spell last Friday & Friday night. A sour stomach & a little fresh cold. She has been so cross since but does not seem to be sick—How is your cold by this time? Better I hope—It seems you must have been born unlucky or you would not have so much trouble. Why can't you be fortunate like myself—Mrs. Orth would like to buy the pair of turkeys if we would care to sell them, so what do you think about it. The express was \$1.70 and what did you pay for them? They are such a hard fowl to raise that they are risky business for a green hand. Leo McGonigal would like to have one for Christmas but I feel as though they were too expensive for me eat. We shall look for a letter right away as soon as you get this telling us all we have asked about, whether you are coming home for Xmas or not and everything else concerning you. I paid lodge dues twice but there is no assessment for Jan. Mr. F. D. Smythe must be clerk now again as he sent the last receipt. Am going to send Dec. dues about the 20th of this month—I got the line yesterday where you sent me the \$20.00. Many thanks “old man”—Let us hear from you right away.

We would like to know where you will be at Christmas time. The kiddies are all feeling pretty well at this writing. Will close now as it must be dinner time & the Kiddies will be here from school—Don't forget to answer this right away—

Yours truly, Vida M. M.

What did you mean about the house?

[fol. 80]

PLAINTIFF'S EXHIBIT No. 5

Legal Department Modern Woodmen of America, Rock Island,
Illinois

Office of Benj. D. Smith, General Attorney

[Letterhead omitted]

Rock Island, Ill., Jan. 3, 1913.

Mrs. Vida Mixer, Jackson, Neb.

DEAR MADAM: On December 19th I wrote to you concerning closing up the case of W. C. Mixer, but for some reason you have not replied to my letter. However, the Clerk of our Camp advises me that you have remitted to him as late as December 28th for assessments and dues.

I take it that perhaps you have concluded to keep up your husband's certificate, and of course I have no objection to your doing this, but I write to advise you that we will not hold our proposition open to return payments to you, and if you conclude to continue to pay the assessments you will do so with the understanding that the society will not hereafter return the same.

Please write me what you may conclude to do about the matter, so I may be governed accordingly.

I enclose stamped envelope for reply.

Yours very truly, Benj. D Smith, General Attorney, M. W. of A.

[fol. 81]

PLAINTIFF'S EXHIBIT 6

"The Modern Woodman," F. O. Van Galder, Editor

Modern Woodmen of America

[Letterhead omitted]

Fraternal Beneficiary Society

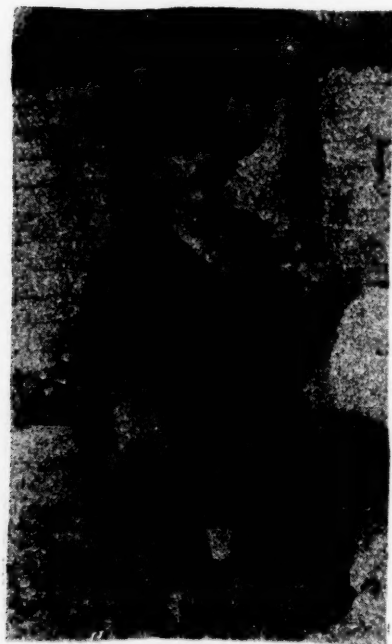
Please direct your reply to M. W. of A. Publication Building, Rock Island, Ill.

Rock Island, Ill., January 31, 1913.

Mr. S. P. Leis,
Clerk, Camp 4497,
M. W. of A.,
Jackson, Neb.

ESTEEMED NEIGHBOR:

I am returning to you herewith photograph of Mr. Mixes, as under the rules I am not allowed to insert notices asking for the whereabouts of any one. I am very sorry that I cannot aid Mrs. Mixes in locating her husband, but, of course, cannot afford to conflict with rules laid down for the conduct of the official paper. In a membership as large as ours of over a million men there are thousands of missing relatives and friends, and we were receiving so many requests of this kind that we could not afford to devote the space to these disappearance items, as they were crowding out matters of general interest to our members, also I wish to state that in no case would I be permitted, under



*a part of
Pltiffs Exhibit No. 6.*

a ruling promulgated by our Legal Department, to advertise for the whereabouts of a missing member of our Society. Trusting that you understand the position I am forced to take in this matter, I remain,

Fraternally yours, *F. O. Van Galder, Editor Modern Woodman.*

[fol. 82]

JENNIE VIDA MIXER

Direct:

70 Q. Handing you Plaintiff's Exhibit 6 I will ask you where you received that letter?

A. This is from the Jackson Camp.

71 Q. Did you have the Clerk of the Jackson Camp write into the Headquarters of the Modern Woodmen?

A. The home camp at Elk Point, had that done, his camp.

72 Q. There is attached to this letter a picture. Who sent that in to the Headquarters of the Modern Woodmen of America?

A. Well I would not say whether it was thru the home camp or the Jackson Camp, I am not certain.

73 Q. You gave that picture to one or the other?

A. Yes.

74 Q. And this letter was given to you by the Clerk of the Camp at Jackson?

A. Yes.

75 Q. And the picture?

A. Yes.

Mr. Leamer: We offer in Evidence Plaintiff's Exhibit 6.

Mr. Pratt: Objected to as immaterial.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 6 was thereupon received in evidence, and the original thereof is attached to this bill of exceptions following, constituting Page 22 hereof.

[fol. 83] 76 Q. Handing you Plaintiff's Exhibit 7 I will ask you if that is a letter which you received from the Modern Woodmen of America?

A. This is one that I received when I was with my mother.

77 Q. That was one you received when you were with your mother?

A. Yes, I had two, one went to Jackson and my son forwarded it to me, and the other was sent to Naper, Nebraska, where my mother was.

Mr. Leamer: We offer in evidence Plaintiff's Exhibit 7.

Mr. Pratt: Objected to because it is immaterial and does not reach any issue in this case.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 7 was thereupon received in evidence, and the original thereof is attached to this bill of exceptions following, constituting Page 24 of this bill of exceptions, viz:

[fol. 84]

PLAINTIFF'S EXHIBIT 7

Legal Department, Modern Woodmen of America

Truman Plantz, General Attorney

[Letterhead omitted]

Warsaw, Ill., January 7, 1920.

Mrs. Viola Mixer, Jackson, Nebraska.

DEAR MADAM: I have been trying to get some information regarding your husband, W. C. Mixer, but so far have been unable to get any trace of him.

I am writing to ask if you have received any word from or regarding him and I enclose self addressed stamped envelope for your reply.

Yours truly, Truman Plantz, General Attorney, M. W. of A.

[fol. 85]

JENNIE VIDA MIXER

Direct:

78 Q. Mrs. Mixer you wrote to his different sisters and relatives soon after he disappeared did you, about his disappearance?

A. Yes sir.

79 Q. And thru these letters it was the understanding if anything was heard from him that they would write to you, and that you would write to each other?

A. Yes sir.

80 Q. Have you ever heard from any of these sisters recently?

A. I did.

81 Q. Have you those letters?

A. I have.

82 Q. Handing you Plaintiff's Exhibit 8 I will ask you if this is one of the letters you received from one of the sisters of Mr. Mixer?

A. Yes.

83 Q. What sister is that from?

A. This letter is from the sister at Rockford.

84 Q. You just received that recently?

A. Recently, yes sir.

Mr. Leamer: We offer in evidence Plaintiff's Exhibit 8.

Mr. Pratt: Objected to as immaterial, because it does not reach or tend to reach any of the issues in the case.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 8 was thereupon received in evidence and the original thereof constitutes Page 28 hereof.

[fol. 86]

PLAINTIFF'S EXHIBIT 8

618 S. Third St., Rockford, Ill., Nov. 13, 1921.

DEAR VIDA: I- seemed good to hear from you again directly, for of course Minnie always tells me about you all, and also Eva tells me. I sent your letter to Eva, she is having a delightful time in the city there isent much that is good to see but what she sees it especially in the line of good plays and good music, her address if 105 Morning Side Drive, New York City, N. Y. No I haven't heard anything of Walter either directly or indirectly. Since he went away. Your lawyer wrote me making the same inquiries last year. We also are having a min-ature winter after just the lovliest fall. I can't help but think we will have some pleasant weather yet. I wrote Minnie last week. I am glad she is liking her school better. Eva said it was a very desirable one, love to you all from Ralph and

Very truly yours, Minnie M. Rowe.

JENNIE VIDA MIXER

Direct:

85 Q. Handing you Plaintiff's Exhibit 9 I will ask you if that is a letter received from one of Mr. Mixer's sisters?

A. Yes.

86 Q. What sister is that from?

A. His sister Eva Mixer.

Mr. Leamer: We offer in evidence Exhibit 9.

[fol. 87] Mr. Pratt: Objected to for the reason that it is incompetent, irrelevant and immaterial, self-serving and hearsay.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 9 was thereupon received in evidence, and the original thereof constitutes Page 28 of this bill of exceptions.

87 Q. Mrs. Mixer did the Sheriff of Dakota County make any inquiry for you concerning the whereabouts of Mr. Mixer?

A. He was to send out some cards that were printed.

88 Q. He had some cards printed?

A. Yes.

89 Q. Have you one of those cards?

A. I have.

90 Q. Handing you Plaintiff's Exhibit 10 I will ask you if it is one of the cards that the Sheriff had sent out?

A. Yes sir.

91 Q. Do you know how long ago it was that the sheriff had these sent out?

A. Well it wasn't so very long after, I didn't hear from him—

PLAINTIFF'S EXHIBIT 9

#106 Morningside Drive,
New York City, N. Y., Nov. 13, 1921.

MY DEAR VIDA: Your letter came by the way of Rockford this week. I surely hope that you will get your insurance, as brother Walter is undoubtedly dead. Walter had faults as we all have, but he loved his family dearly, and would never have remained away from them all these years without attempting to get into communication with them. As you know none of us have heard from him since his disappearance more than ten years ago. We all believe him dead and have for a number of years. You have kept up the insurance for your children all these years and surely no lodge, ins-ited for family protection will deny you the claim. I am sure you will get it.

[fol. 88] Write me if I can be of any further use to you. I am having a wonderful year at Columbia. I only wish I had come some ten years ago.

With love, I am,

Your sister, Eva E. Mixer.

JENNIE VIDA MIXER

Direct:

—but I would not say what year.

92 Q. A year or two afterwards?

A. Possibly.

93 Q. It wasn't over two years afterwards?

A. I don't think so.

94 Q. It was more than seven years ago?

A. Oh, yes.

Mr. Leamer: We no- offer in evidence Plaintiff's Exhibit 10.

Mr. Pratt: Objected to as incompetent, irrelevant and immaterial.

Overruled, to which defendant excepts.

Plaintiff's Exhibit 10 was thereupon received in evidence, and the original thereof is attached hereto, constituting page 30 of this bill of exceptions.

95 Q. I think you testified that you have not heard directly or indirectly since February, 1911, of Mr. Mixer?

A. I have not heard from him in any way.

96 Q. Nor any of the relatives that you have been in correspondence with?

A. No they haven't.

[fol. 89] Cross-examination by Mr. Pratt:

97 Q. You say he left one time prior to this last time?

A. Yes sir.

98 Q. How long was he absent then?

A. About six weeks.

PLAINTIFF'S EXHIBIT 10

INFORMATION WANTED

Concerning the whereabouts of the following described person, who has been missing since November, 1910:

Walter C. Mixer.

Height 6 feet, 1 inch.

Age 54 years, May, 1913.

Black hair, sprinkled with gray.

Size of shoe, No. 8.

Rather small hands and short fingers.

Weight about 170 pounds.

Stooped shoulders. Affected by chronic bronchitis.

Small dark brown eyes, wore farsighted glasses.

Left home at Jackson, Neb., just before Thanksgiving, 1910; last word received from him was on February 4, 1911, from Midland, South Dakota; is a member of the M. W. A. Camp No. 1957, Elk Point, South Dakota.

Any information will be thankfully received.

Frank Mahon, Sheriff, Dakota City, Neb.

JENNIE VIDA MIXER

Cross:

99 Q. And was he short in his accounts that time he left?

A. That is a matter I didn't know anything about at that time.

100 Q. Didn't he ever talk to you?

A. He would not talk to me about it when he came back.

101 Q. He didn't give you any reason why he done it?

A. No.

102 Q. Made no statement why he was absent six weeks?

A. No.

[fol. 90] 103 Q. Was it six weeks or six months?

A. Six weeks.

104 Q. Do you know where he was during those six weeks?

A. No I don't, only that he told me that he was at his sister's at Rockford. That is the only place that he told me where he was.

105 Q. But he quit his position with this firm in Sioux City at that time?

A. Yes, sir.

106 Q. You heard from others that he was short in his accounts?

A. I heard from Mr. McClure the second time.

107 Q. That he was short the first time?

A. That he was short, yes.

108 Q. As a matter of fact you made up that first shortage yourself?

A. Well my sister in law and I did.

109 Q. You paid part?

A. Yes.

110 Q. How long between the first time he returned and his leaving the second time?

A. It was during the summer of 1910 that he was away and Mr. McClure made him a pretty fair offer to come back and go to work and make up his line of travel again.

111 Q. How long was it after he came back the first time before he went away the second time?

A. Well he was gone in August, was when I didn't hear from him first, and it was in November the following that he went away and I have never seen him since.

112 Q. And he never gave you any explanation why he went the first six weeks?

A. No sir, he would not talke to me about it.

113 Q. You never asked him any questions about it?

A. Yes sir.

114 Q. But he never made any reply?

A. He would not tell.

[fol. 91] 115 Q. He refused to converse with you at all about his disappearance?

A. Yes sir.

116 Q. And all you know about his shortage the first time was what Mr. McClure told you?

A. Yes sir.

117 Q. Did your husband know that you arranged to pay a portion of this money back and did pay a part of it back?

A. No sir.

118 Q. He didn't know?

A. No sir.

119 Q. You didn't pay that until after he left the second time?

A. Yes sir I paid that before the second time.

120 Q. Before he left the second time?

A. Yes sir.

121 Q. Now when did he leave the second time? About what time?

A. Just before Thanksgiving of that year.

122 Q. That was after he had been employed by the McClure Company and he went then to some place in South Dakota?

A. Yes, his line of travel was up thru Mitchell, and beyond Mitchell.

123 Q. Did he have a team to travel with?

A. Yes, the last time.

124 Q. Was that team his own or did it belong to the company?

A. I don't think that he had any interest in it, he might have had.

125 Q. It belonged to the McClure Company?

A. I think it did.

126 Q. Do you know what became of that *time*?

A. No.

127 Q. Did you ever make any inquiry about it?

A. We did.

128 Q. And never found out?

A. Never heard a thing.

129 Q. You don't know whether he took the team or not?
[fol. 92] A. The last time I talked with Mr. Clure he told me he didn't know.

130 Q. Altho it was McClure's team?

A. Yes sir.

131 Q. Did they make any effort to find out where the team was?

A. He said he did.

132 Q. And could not find it?

A. Could not find it.

133 Q. I believe that he was at Midland South Dakota when you heard from him in Dakota?

A. Yes sir.

134 Q. Did you ever go to Midland, South Dakota, to find out whether he had been there?

A. No I didn't, I had no means to go.

135 Q. Did you write to that place?

A. No I didn't, I don't think I did.

136 Q. When did you hear from him next after Midland, South Dakota?

A. I never hears from him after Midland.

137 Q. You got a letter from him at Midland?

A. Yes sir.

138 Q. Telling you to write some place else?

A. Yes sir.

139 Q. That was Austin, Minnesota?

A. Yes sir.

140 Q. And he told you to write him under an assumed name?

A. Yes, sir. (Interlineation made by me. H. C. Lindsay, Clerk Supreme Court Nebraska.)

141 Q. Did he give any reason why?

A. No he didn't given any reason, exactly.

142 Q. Had he ever done that before?

A. No sir.

143 Q. Never had asked you to write him under an assumed name?

A. No sir.

144 Q. You wrote to him at Austin, Minnesota under this assumed name?

A. Yes sir.

145 Q. When did you found out first that he was short the second [fol. 93] time he left?

A. Just about Christmas.

146 Q. Of 1910?

A. Yes sir.

147 Q. Have you ever heard how much he was short in his accounts?

A. Mr. McClure told me about fifteen hundred dollars.

148 Q. Do you know whether any portion of the amount he was short the first time had ever been paid back other than what you and your sister paid?

A. No.

149 Q. Do you know what his shortage was the first time?

A. No sir.

150 Q. About a thousand dollars.

A. I really don't know.

151 Q. You know how much you paid back on that shortage?

A. Well, yes, I know how much money was sent for me.

152 Q. How much did you and your sister pay back on that shortage?

A. Two Hundred dollars.

153 Q. How long after he left or he said he was to leave Midland, South Dakota, did you write to Austin, Minnesota?

A. Well I wrote within about a week's time.

154 Q. Would that be along about Christmas that you wrote, or after Christmas?

A. After Christmas.

155 Q. When did you get the final letter from him, Mrs. Mixer?

A. February 4, 1911.

156 Q. And where was that?

A. I don't remember.

157 Q. Was that at Austin, Minnesota?

A. No, I never heard from Austin, only from the Postmaster.

158 Q. Did he say anything in that letter about writing him under an assumed name, or is that the letter in which he told you to write under an assumed name?

A. Yes, that was the letter.

[fol. 94] 159 Q. You are not able to state now whether that was at Austin, Minnesota or whether it was at Midland or some other town?

A. I never heard from him at Austin, Minnesota.

160 Q. Then the letter you received February 4, 1911 was from Midland, South Dakota?

A. Yes sir.

161 Q. And you think in this letter he told you to write under an assumed name?

A. I have had two from Midland and one letter I don't remember where it did come from.

162 Q. Did he sign his name to that letter?

A. He *just* it just "Walter."

163 Q. How many letters did you write to him under this assumed name?

A. I wrote one to Midland, and two, that is one to the Postmaster at Austin, and one to him at Austin.

164 Q. When were you married to Mr. Mixer?

A. November 1898.

165 Q. How long had you know- him before you were married?

A. About four months.

166 Q. And how old a man was he at that time?

A. About thirty-eight or thirty-nine.

167 Q. Did he have a trade or was he always engaged in selling goods or kindred occupations?

A. I think he had a stationary engineer license, I know he worked at that at one time in Chicago.

168 Q. But during your married life was he engaged in this one occupation principally of selling goods?

A. In selling clothing and grocer-s together.

169 Q. He had always been a salesman during your married life?

A. Not always, for several years he worked on the section at Jackson.

170 Q. Where is Jackson?

A. It is about ten miles west of here.

[fol. 95] 171 Q. You live now in this country?

A. Yes sir.

172 Q. Where do you live?

A. I am living at Jackson.

Redirect examination by Mr. Leamer:

173 Q. Mrs. Mixer you had several conversations with Mr. McClure about Mr. Mixer did you not?

A. Yes sir.

174 Q. And it was the understanding between you two that if either one would hear from him to leave the other one know?

A. Yes sir.

175 Q. And Mr. McClure has never heard?

A. He has never sent me any word. I haven't seen him for sometime, but I promised that if I ever heard I should let him know and he promised me the same thing, that he would tell me if he heard or found any trace of him, he told me he would do that, and I have never heard.

176 Q. You have lived at Jackson ever since the disappearance of Mr. Mixer?

A. Except two years that I worked in Sioux City and I was in Montana from April until August, the last of July.

177 Q. How big a family do you have?

A. I have four children.

178 Q. How old is the oldest one now?

A. Twenty-one.

179 Q. And the youngest one?

A. Thirteen tomorrow.

180 Q. How many of them are with you?

A. I have the two youngest ones with me.

181 Q. You made all your inquiries, mostly by letter and writing, didn't you?

A. Yes sir.

182 Q. The reason I think you stated you didn't go to Midland I believe was that you didn't have the money?

[fol. 96] A. No means to prosecute a search.

183 Q. As a matter of fact you were on the county, getting help from the county for several years, weren't you?

A. Yes sir.

184 Q. When you had the children in school at Jackson?

Q. Yes sir.

Witness excused.

MINNIE M. MIXER, a witness for the plaintiff, was regularly sworn and testified as follows:

Direct examination by Mr. Leamer:

185 Q. Are you the daughter of Mrs. Mixer the plaintiff in this action?

A. Yes sir.

186 Q. Are you the oldest child?

A. Yes sir.

187 Q. What are you doing now?

A. Teaching at Blair, Nebraska.

188 Q. You have been home practically — of the time for the last ten or eleven years?

A. All but the last four, I have been teaching away, but I have been home at different times during these times.

189 Q. You was home back and forth?

A. Yes sir.

190 Q. Were you home when your father disappeared?

A. Yes sir.

191 Q. Do you remember when it was he left?

A. I can remember ten years back, but before that I can't remember, only I can remember the morning he left we went to the train with him, just before Thanksgiving and he promised to be back by Christmas time.

192 Q. And he never came back?

A. No.

193 Q. You have never seen him since that time?

[fol. 97] A. No sir.

194 Q. That was over ten years ago?

A. Yes, I can remember ten years, but before that time I cannot.

195 Q. Have you heard directly or indirectly from him in any way?

A. No sir.

196 Q. You have had correspondence with the daughter, I think, of his brother in Colorado?

A. Yes sir.

197 Q. And in your correspondence with them did you tell them about your father being gone?

A. Yes sir.

198 Q. And have they ever written whether they had heard from him or not?

A. No, they never have.

199 Q. You mean they never had heard from him?

A. At least they never said anything about it.

200 Q. Did you ever get any letters from, what is the name of the brother who lives in Colorado?

A. Henry Mixer.

201 Q. Would you know his writing if you saw it?

A. No I n-ver have seen it.

202 Q. I think you testified you have been home all except the last four years?

A. Yes.

203 Q. And you know of your father not being home any of that time?

A. Yes.

204 Q. And you have never heard from him?

A. No sir.

The defense declined to cross examine witness.

Witness excused.

Mr. Leamer: The plaintiff rests.

[fol. 98] Mr. Pratt: The defendant rests.

There was nothing further on behalf of either the plaintiff or defendant.

REPORTER'S CERTIFICATE

I, the undersigned, Robert G. Fuhrman, Official Stenographer of the District Court of the 8th Judicial District of the State of Nebraska, do hereby certify the above and foregoing to be a true and correct copy of the original shorthand notes taken by me upon the trial of the case of Jennie Vida Mixer, Plaintiff, v. Modern Woodmen of America, Defendant.

I, further certify that the within attached exhibits, identified as Plaintiff's Exhibits 1 to 10, inclusive, are the original exhibits offered and received upon the trial of the within stated action, and all the exhibits, and constitute all of the documentary evidence offered and received upon said trial.

Dated at Pender, Nebraska, January 23, 1922.

Robert G. Fuhrman, Official Stenographer, Eighth Judicial District of Nebraska.

[File endorsement omitted.]

[fol. 99] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

PRÆCIPUE FOR NOTICE OF APPEAL—Filed February 27, 1922

To the Honorable Harry C. Lindsay, Clerk of the Supreme Court:

You will please issue notice of appeal in the above entitled cause.

The Appellant, Modern Woodmen of America, is appealing from a judgment entered in the District Court of Dakota County, Nebraska, for the sum of \$2,046.65 and cost taxed at the sum of \$12.80, entered against the said Modern Woodmen of America on the 10th day of January, 1922, in an action pending, in which

Jennie Vida Mixer was plaintiff and Modern Woodmen of America was defendant. The said Modern Woodmen of America is Appellant herein and the said Jennie Vida Mixer is Appellee herein.

Modern Woodmen of America, by Nelson C. Pratt, Its Attorney.

[File endorsement omitted.]

[fol. 100] THE STATE OF NEBRASKA, ss:

IN SUPREME COURT OF NEBRASKA

NOTICE OF APPEAL—Filed March 3, 1924

To the Sheriff of the County of Dakota:

You are hereby commanded to notify Jennie Vida Mixer that an appeal has been taken to the Supreme Court of the State of Nebraska by Modern Woodmen of America, a corporation, asking the reversal of a judgment against it rendered on the 10th day of January, A. D. 1922, in a certain cause in the District Court of Dakota County, wherein Jennie Vida Mixer was Plaintiff, and Modern Woodmen of America, a corporation, was Defendant.

You will make due return of this notice on or before thirty days after the date hereof.

Witness my hand and the Seal of said Court, at the City of Lincoln, this 27th day of February, 1922.

H. C. Lindsay, Clerk, by P. F. Greene, Deputy. (Seal.)

Service of the within Notice of Appeal acknowledged this 1st day of March, 1922.

Jennie Vida Mixer, Appellee, by Geo. W. Leamer, Attorney.

[File endorsement omitted.]

[fol. 101] SUPREME COURT OF NEBRASKA, NOV. 22

ARGUMENT AND SUBMISSION

The following causes were argued by counsel and submitted to the Court:

[Title omitted]

A. M. Morrissey, Chief Justice.

* Day and Good, JJ., not sitting.

† Rose, J., not sitting.

[fol. 102] SUPREME COURT OF NEBRASKA

[Title omitted]

JUDGMENT—Rendered December 31, 1923

This cause coming on to be heard upon appeal from the district court of Dakota county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, ordered and adjudged that said judgment of the district court be, and hereby is, affirmed at the costs of appellant, taxed at \$——; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion per Curiam.

A. M. Morrissey, Chief Justice.

[fol. 103] IN NEBRASKA SUPREME COURT

[Title omitted]

OPINION—Filed December 31, 1923

No syllabus.

[fol. 104] Heard Before Morrissey, C. J., Letton, Day, and Dean, JJ., Shepherd, District Judge

Per CURIAM:

For the reasons given in *Garrison v. Modern Woodmen of America*, 105 Neb. 25, *Coverdale v. Royal Arcanum*, 193 Ill. 91, and *Boynton v. Modern Woodmen of America*, 148 Minn. 150, the judgment of the district court is affirmed.

[fol. 105] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

MOTION FOR REHEARING—Filed January 23, 1924

Comes now the appellant and moves the Court to vacate and set aside the judgment and opinion heretofore rendered herein and to grant a rehearing for the following reasons:

I

Because the Court erred in failing to find and decide that the District Court of Dakota County erred in sustaining the demurrer of plaintiff appellee herein to the first division of the affirmative

grounds of defense of defendant's appellant's herein answer, and thereby failed to give full faith and credit to the judgment of the Supreme Court of the State of Illinois in the case of Steen vs. Modern Woodmen of America as pleaded, as required to be done by the Constitution of the United States and the Statutes of the United States although this question was presented and contended for by the appellant both in its brief and in the oral argument.

[fol. 106]

II

Because the Court erred in not holding that the full faith and credit clause of the United States Constitution, Article 4, Section 1, and the Statutes of the United States enacted pursuant thereto, were violated by the refusal of the District Court of Dakota County to hold that the appellant, a mutual benefit society, under its charter had the power to enact by-law No. 66, as follows:

"Sec. 66. Disappearance no Presumption of Death.—No lapse of time or absence of disappearance on the part of any member, heretofore or hereafter admitted into the Society, without proof of the actual death of such member, while in good standing in the Society, shall entitle his beneficiary to recover the amount of the Benefit certificate, except as hereinafter provided. The disappearance or long continued absence of any member unheard of, shall not be regarded as evidence of death or give any right to recover on any Benefit certificate heretofore or hereafter issued by the society until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality has expired within the life of the Benefit certificate in question and this law shall be in full force and effect, any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding. The term 'within the life of the Benefit certificate,' as here used, means that the Benefit certificate has not lapsed or been forfeited, and that all payments required by the By-laws of the Society have been made."

which by-law construed by a judgment of the Supreme Court of the State of Illinois, entered on the twenty-first day of December, 1920, entitled Louisa W. Steen vs. Modern Woodmen of America, as pleaded by appellant, is valid and violates no contract rights of the certificate holder or his beneficiary.

[fol. 107]

III

Because the Court erred in not recognizing the controlling effect of the Illinois law as established by the judgment in the case of Steen against appellant, although this decision and judgment were duly pleaded and presented by the record and the questions contended for by the appellant both in its brief and in the oral argument.

IV

Because the Court erred in holding and deciding that the Trial court did not err in holding that appellant did not have the power to

contract with reference to a rule of evidence when the question of power had already been determined by the Supreme Court of Illinois, the home state of the corporation, on the twenty-first day of December, 1920, in the case of Louisa W. Steen vs. Modern Woodmen of America, this judgment and opinion having been duly pleaded and presented by appellant both in its brief and in the oral argument.

V

Because the Court erred in sustaining and affirming the judgment of the District Court of Dakota County in refusing to apply the laws of the State of Illinois, the domicile of the appellant corporation as proved and established by the first division of the affirmative grounds of defense in appellant's answer, and demurred to by appellee, for the purpose of determining the corporate power of the corporation and the rights and liabilities under the contract of membership as set forth in the answer of appellant, and the facts therein alleged duly admitted by the demurrer filed by appellee as required by the Federal Constitution and statutes.

Truman Plantz, George H. Davis, Nelson C. Pratt, Attorneys
for Appellant.

[File endorsement omitted.]

[fol. 108]

SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER DENYING REHEARING—February 2, 1924

This cause coming on to be heard upon motion of appellant for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein denied.

A. M. Morrissey, Chief Justice.

[fol. 109]

SUPREME COURT OF NEBRASKA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed February 4, 1924

To Hon. H. C. Lindsay, Clerk of the above-entitled Court:

You are hereby requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Certiorari in said cause, the transcript to consist of the record, the appeal in said cause, the opinion of the

Supreme Court of Nebraska, all Journal Entries contained in the records and proceedings of the Supreme Court of the State of Nebraska relating to said cause, the motion for rehearing, the final judgment and decision of the Supreme Court of the State of Nebraska, and your certificate to the record that it is a complete record in said cause.

Dated this 4th day of February, 1924.

Nelson C. Pratt, Attorney for Modern Woodmen of America.

[fol. 110 & 111] [File endorsement omitted.]

[fol. 112] IN SUPREME COURT OF NEBRASKA

[Title omitted]

APPLICATION AND ORDER STAYING THE EXECUTION OF MANDATE—
Filed February 4, 1924

Comes now the appellant, Modern Woodmen of America, and represents to the Court that through its Counsel it has ordered a transcript of the proceedings of the trial of the above named case in the District Court, and all of the record and proceedings in the Supreme Court for the purpose of making application to the Supreme Court of the United States for a Writ of Certiorari; that the appellant intends to make such application at the earliest possible time, and through its attorneys is now preparing the application for Writ of Certiorari, together with brief in support thereof; that said appellant, through its attorneys, believes that it has good cause for making said application for Writ of Certiorari and said application is made in the best of faith and is not made for the purpose of delay.

Wherefore, appellant prays that an order may be entered staying the issuance of the mandate until such time as said cause may be docketed and determined in the Supreme Court of the United States, and to fix the amount of a proper bond to be furnished, and for such other relief as may be just and proper.

Nelson C. Pratt, Attorney for Modern Woodmen of America,
Appellant.

Jurat showing the foregoing was duly sworn to by Nelson C. Pratt omitted in printing.

[fol. 113] [File endorsement omitted.]

This cause coming on to be heard upon motion of appellant to withhold issuance of mandate, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and hereby is, sustained, and clerk directed to withhold issuance of mandate until the further order of the court.

A. M. Morrissey, Chief Justice.

[fol. 114] STATE OF NEBRASKA,
County of Lancaster, ss:

CLERK'S CERTIFICATE

I, H. C. Lindsay, Clerk of the Supreme Court within and for the State of Nebraska and custodian of the files and records thereof, do hereby certify that the foregoing, consisting of pages 1 to 113, inclusive, is a true, full and complete transcript of the entire record and proceedings in said Supreme Court in the case of Jennie Vida Mixer v. Modern Woodmen of America, No. 22635, the same being an appeal from the district court in and for Dakota county, Nebraska, together with the opinion filed in said case and the final judgment rendered therein as the same are of record and on file in my said office.

In witness whereof, I have hereunto set my hand and affixed the Seal of said Court, at Lincoln, Nebraska, this 25th day of February, A. D. 1924.

H. C. Lindsay, Clerk Supreme Court Nebraska. (Seal of Supreme Court Nebraska.)

Charges for this transcript, \$33.35. Paid by Nelson C. Pratt Feb. 25, 1924. H. C. Lindsay, Clerk.

[fol. 115] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PRINTING RECORD—Filed March 15, 1924

It is stipulated and agreed by and between Nelson C. Pratt, Counsel for Petitioner, and George W. Leamer, Counsel for Respondent, that in order to save expense in the printing of the record herein Plaintiff's Exhibit No. 1, which appears on page 68 of the original record in this cause may be omitted from the printed record for the reason that the material portions of said Exhibit appear in other parts of the record.

Dated this 10th day of March, 1924.

Nelson C. Pratt, Counsel for Petitioner. George W. Leamer,
Counsel for Respondent.

[fols. 116 & 117] [File endorsements omitted.]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

On Petition for Writ of Certiorari to the Supreme Court of the State
of Nebraska

ORDER GRANTING WRIT OF CERTIORARI—Filed April 28, 1924

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Nebraska, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

(2961)